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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1954.

No. 295

FRANKLIN B. BOWES, ET AL.,

Petitioners,

vs.

CITY OF CHICAGO, A MUNICIPAL CORPORATION, CHICAGO PARK DISTRICT, A MUNICIPAL CORPORATION, AND GREAT LAKES DREDGE & DOCK CO., A CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

Petitioners,

Franklin B. Bowes,
American Furniture Mart Building Co., Inc.,
Beck Oil Company,
1120 Lake Shore Drive Building Corporation,
Five Twenty Michigan, Inc.,
1400 Lake Shore Drive Corporation,
Illinois Agricultural Association,
Beatrice Joyce Kean,
Mark Kemper,
Lakefront Realty Corporation,
National Realty & Investment Company,
John M. Rau,
333 Building Corporation,
Winfield Tice,
Ernest B. Tickner,

plaintiffs-appellees in the court below, pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Illinois entered in the above entitled cause on May 24, 1954.

OPINIONS BELOW.

The opinion of the Supreme Court of Illinois has not as yet been officially reported but is reported at 120 N. E. 2d 15 (Advance Sheet of July 7, 1954). It is appended to this petition as Appendix A. The opinion of the Chancellor in the court of first instance is included in the record (R.[1] 117).

JURISDICTION.

The judgment of the Supreme Court of Illinois was entered on May 24, 1954 and, as rehearing was not requested, became final on that date. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3) and § 2101(e).

QUESTION PRESENTED FOR REVIEW.

Does the Secretary of the Army, acting under Section 10 in the Act of March 3, 1899 (30 Stat. 1151, 33 U. S. C. § 403), have power to authorize a fill of approximately 70 acres in the navigable waters of the United States at Chicago Harbor, an established and existing harbor and harbor of refuge, when the primary and dominant purpose of, and the actuating reason for, the fill is not to protect, improve or maintain navigation, or any other form of commerce, but is to constitute the site and serve as foundation for a water filtration plant of the City of Chicago?

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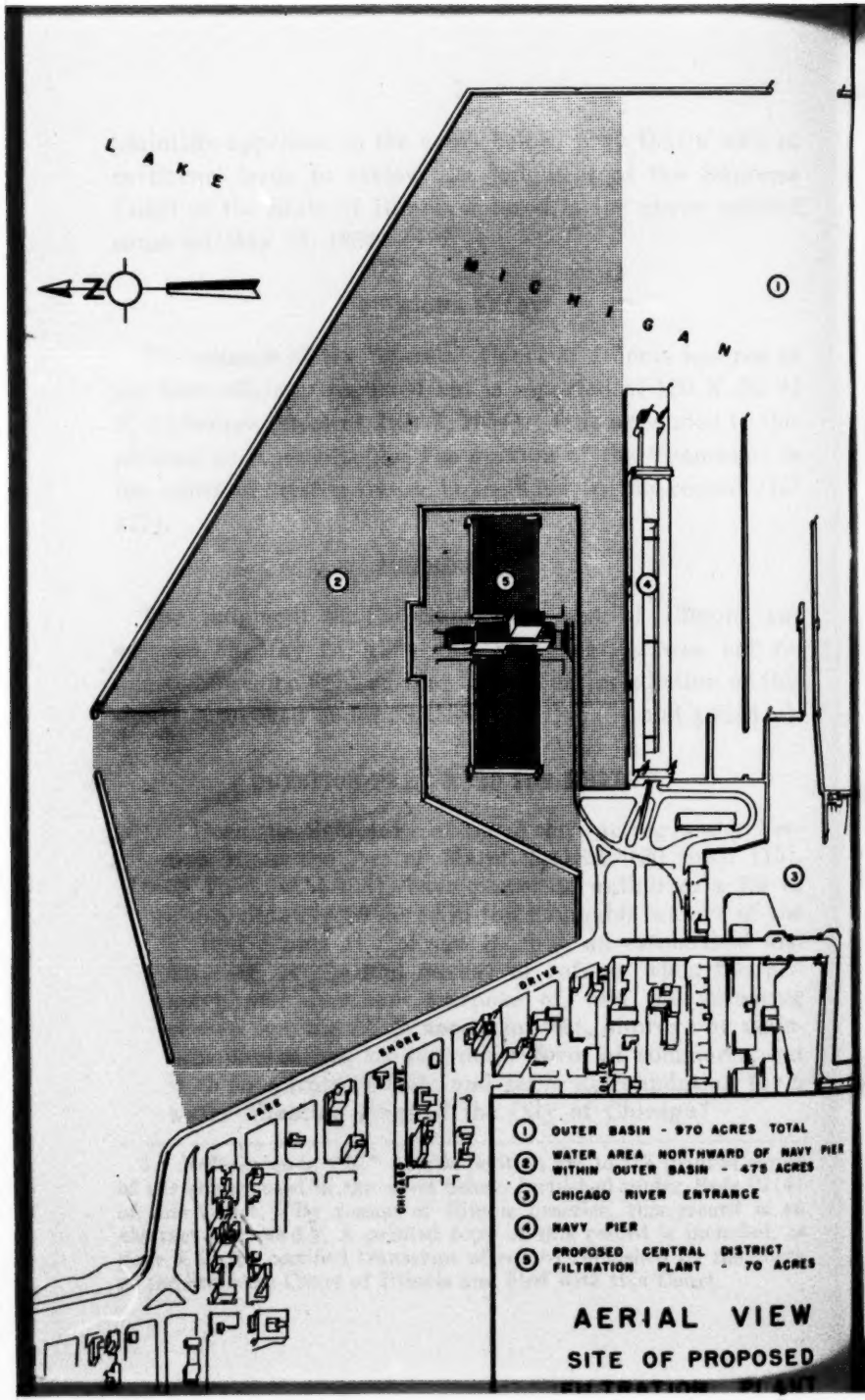
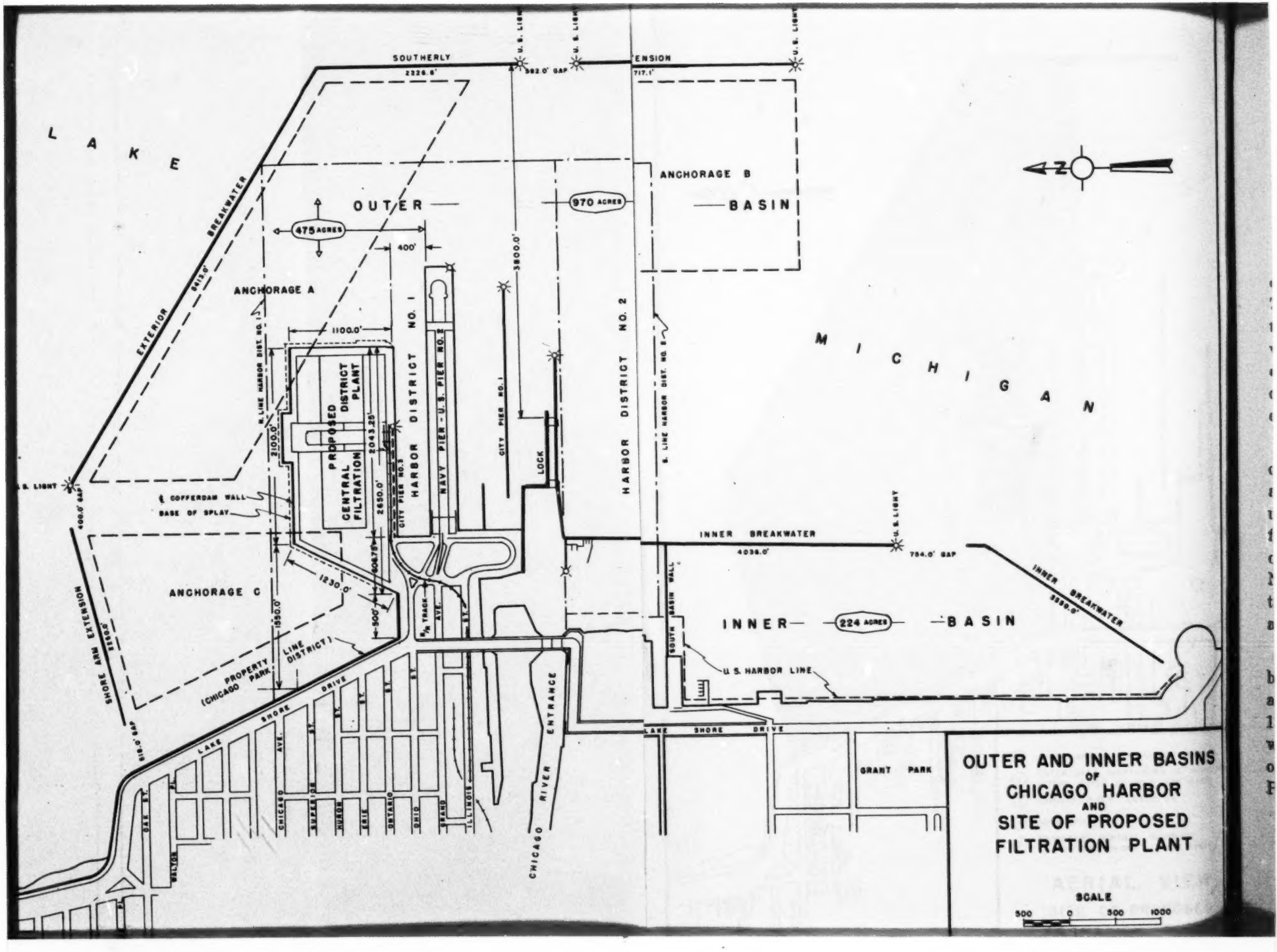
1. References to "R." in this petition are to the printed copies of the record used in the court below, furnished under Rule 21(4) of this Court. (By reason of Illinois practice, this record is an abstract of record.) A printed copy of this record is included, as page 3, in the certified transcript of record furnished by the Clerk of the Supreme Court of Illinois and filed with this Court.


LAKE
MICHIGAN
N
1
2
3
4
5
LAKE SHORE DRIVE
CHICAGO RIVER
1 OUTER BASIN - 970 ACRES TOTAL
2 WATER AREA NORTHWARD OF NAVY PIER WITHIN OUTER BASIN - 475 ACRES
3 CHICAGO RIVER ENTRANCE
4 NAVY PIER
5 PROPOSED CENTRAL DISTRICT FILTRATION PLANT - 70 ACRES
AERIAL VIEW
SITE OF PROPOSED



OUTER AND INNER BASINS OF CHICAGO HARBOR AND SITE OF PROPOSED FILTRATION PLANT

STATUTE INVOLVED.

The statute involved is Section 10 of the Act of March 3, 1899, 30 Stat. 1151 (33 U. S. C. § 403) set forth verbatim in Appendix B to this petition.

STATEMENT OF THE CASE.

The action below was commenced by petitioners and others to enjoin construction by the City of Chicago of a 70-acre water filtration plant in the navigable waters of the Federal Harbor at Chicago north of Navy Pier. The validity of the purported permit issued by the Secretary of the Army for the fill upon which the plant was to be constructed is one of the controlling questions raised at every stage of the proceedings below.

The city council of the City of Chicago chose land in Chicago Harbor submerged by the waters of Lake Michigan as the site to be filled and, following reclamation by filling, upon which to construct and operate (R. 511) a water filtration plant to serve, with filtered water, the two-thirds of the city's population who live north of 39th Street. Nine different sites were studied by the municipal authorities and their consultants (R. 516), one of which was approved with modification.

The shape, dimensions and location of the site selected by the city are shown in detail by Figures I and II (which are Exhibits B and C, respectively, to the complaint, R. 1). The site is not located within shoal and shallow waters unfit for navigation but within the navigable waters of the United States in the 475 acres lying north of Navy Pier of the northerly half of the Outer Basin of Chicago

Harbor. The area of this site at the surface of Lake Michigan is 2,612,500 square feet. On the bed of the lake at the base of the proposed construction the area is approximately 70 acres, or one-seventh of the 475 acres in Chicago Harbor northward of Navy Pier.[2] By reference to Figure I, it will be noted that the perimeter of the cofferdam, measured along the center line of its walls, is 7,080 feet, or 1⅓ miles.

The city has indicated that the highest structure of the plant to be constructed on the selected site is to be 62 feet above the level of the waters of Lake Michigan and that the cost of the proposed plant will be $85,000,000.00 (Appendix A, p. ii).

The northerly half of the Outer Basin of Chicago Harbor within which the selected site is located is enclosed by Federal breakwaters along its northerly and easterly sides and is bounded on the south by Navy Pier and on the west by Lake Shore Drive, an important boulevard of the city (Figures I and II).

The primary and dominant purpose of the buildings and other structures which the City of Chicago proposes to construct, maintain and operate at the location it has selected is an extension of the water facilities of the city, particularly in respect of water filtration to serve, among other possible users, water users in the central and north districts of the city. The creation and consequent use of the proposed site and buildings and structures thereon as a slip for the mooring of commercial vessels (R. 1, *Complaint,* Exhibit D, condition 11) is entirely incidental to the primary purpose just stated.

2. This is because of the lakeward splay of the footings for the dike-type sections along the entire west, north and east walls of the cofferdam to be constructed to contain the fill, which splay, on the lake side, of the proposed construction is approximately 69 feet from the vertical center line of these walls.

The City of Chicago made application to the Secretary of the Army for "authority to construct a fill in Chicago Harbor north of Navy Pier" at the site the city had selected for the water filtration plant and referred to previously in this petition. Acting on this application, the Secretary of the Army by an instrument entitled "Permit", issued on January 19, 1951 at direction of Under Secretary of the Army Alexander and set forth in full as Exhibit D to the *Complaint* (R. 1), purported to authorize the work of constructing the fill at the selected site on the conditions set forth in the instrument. The validity of the instrument so issued is the question raised by this petition. This instrument was accepted by the City of Chicago by ordinance passed by its city council on March 2, 1951 (R. 123, *Decree*, Finding of Fact (xi) at p. 7).

By order of the city council of the City of Chicago passed on January 30, 1952 the Purchasing Agent of the city was authorized to enter into a contract with Great Lakes Dredge & Dock Co. for locating and building the cofferdam around the proposed filtration plant (R. 123, *Decree,* Finding of Fact (iv) at p. 5). The contract thus authorized was dated May 9, 1952 and on May 21, 1952 it was returned to the city's office executed by the contractor (R. 123, *Decree,* Finding of Fact (xxiv) at p. 17).

On June 23, 1952 petitioners, with other parties plaintiff heretofore dismissed from the proceedings, brought an action, as to which review is sought by this petition, in the Circuit Court of Cook County, Illinois against respondents for equitable relief including, but not limited to, relief by declaratory judgment pursuant to the Civil Practice Act of the State of Illinois and prayed a permanent injunction against each of respondents (R. 1, *Complaint*, Prayer sections B, C and D and concluding paragraph at pages 63-66). The Chancellor in the court of first instance awarded the injunctions prayed for (R. 123, *Decree,*

at p. 36). The Supreme Court of Illinois dissolved the injunctions thus obtained (Appendix A, p. xxx). In both courts decision of the question presented by this petition for review in this Court was material and a controlling factor in the decision arrived at.

The question presented for review was raised in the Complaint:

Complaint, paragraph VIII (a)1, (a)2 and (a)3 and (b)1 at pages 35 to 37 of the Complaint (R. 1),
Complaint, prayer, Section A clauses 5 and 11 at pages 59 and 60 of the Complaint (R. 1),

and a copy of the above mentioned Federal permit was made a part of the Complaint as Exhibit D. Issue was joined on this question in the answer of each of the three defendants:

Amended Answer of City of Chicago, paragraph 8(a), (R. 85).
Answer of Chicago Park District, paragraph 8(a), (R. 10), and
Order of May 21, 1953 (R. 116-117).
Answer of Great Lakes Dredge & Dock Co., paragraph VIII (a)1, (a)2 and (a)3, and (b)1, (R. 37-38), and
Order of September 29, 1953 (R. 119).

The Chancellor, in the court of first instance, the Circuit Court of Cook County, Illinois, in his opinion (R. 117), filed August 28, 1953, held that the Federal permit challenged in this case (R. 117 at page 61 in the Chancellor's opinion), "is without vitality for any purpose" (R. 117 at page 64 of the Chancellor's opinion) and, in the decree entered in the Circuit Court of Cook County on October 16, 1953 (R. 123), held as a matter of law "that the Federal authorities abused the power and authority granted" by 33 U. S. C. § 403 (R. 123. Findings of fact (xxxi) through (xxxix) at pages 20-22 and conclusion of law 31 at page 33 of that decree).

The Supreme Court of Illinois, in its opinion (Appendix A), held:

(1) That plaintiffs who were taxpayers (including petitioners here) had standing to challenge the validity of the Federal permit and in that connection stated:

> "Here the city of Chicago proposes to build a filtration plant within the harbor area in Lake Michigan adjacent to the city of Chicago. A permit had been obtained from the Federal government. Pursuant to that permit, however, the city of Chicago has become liable upon possible future foreseen liabilities in connection with the construction and alteration of this filtration plant, and the maintenance of the surrounding harbor area. Since such contracted liability will be a drain upon the general fund of the city of Chicago, it is the property of the taxpayers which will be directly affected. The taxpayers consequently may question the validity of the Federal permit." (Appendix A, pp. xxvi-xxvii.)

(2) That the Federal permit involved in this case is valid and in that connection stated:

> "It is not necessary that structures erected upon submerged lands under navigable waters be necessarily in aid of navigation." (Appendix A, p. xxvii.)

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The decision by the Supreme Court of Illinois of the substantial question as to the extent of the power of the Secretary of the Army under Section 10 of the Act of March 3, 1899 (33 U. S. C. § 403) is directly in conflict with the decision of the same question by this Court in *Wisconsin* v. *Illinois*, 278 U. S. 367 (1929). The Illinois Supreme Court, while referring to the latter case, ignored its holding and reached a result precisely opposite to that required by that case.

Section 10 first provides: "The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited * * *." Then, after a clause not pertinent here, the act makes it unlawful "to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, * * * harbor, * * * harbor of refuge, or inclosure within the limits of any breakwater" unless recommended by the Chief of Engineers and authorized by the Secretary of War prior to the beginning of the work.

This Court first had occasion to consider the proper interpretation of Section 10 in *Sanitary District* v. *United States,* 266 U. S. 405 (1925). In that case the Court sustained an injunction obtained by the United States, limiting the sanitary district's right to divert water from Lake Michigan to the Chicago River "without prejudice to any permit that might be issued by the Secretary of War according to law" (p. 432). In so holding, the Court (*per* Mr. Justice Holmes) remarked (p. 431): "It is doubtful at least whether the Secretary was authorized to consider the remote interests of the Mississippi States *or the sanitary needs of Chicago.*" (Italics supplied.)

In *Wisconsin* v. *Illinois,* 278 U. S. 367 (1929), the Court had occasion to decide "whether the Secretary was authorized to consider * * * the sanitary needs of Chicago." That case involved an action by Wisconsin and several other states to enjoin Illinois and the sanitary district from continuing diversions of water from Lake Michigan. The Court (*per* Chief Justice Taft) held (pp. 416, 417) that, since Congress had not authorized the diversion, the right of the defendants to continue the diversion depended upon the effect and operation of a permit issued by the Secretary of War in 1925, pursuant to the authority given

him by Section 10 of the Act of March 3, 1899. This permit temporarily authorized a diversion of water from Lake Michigan at the rate of 8,500 cubic feet per second and was conditioned on the sanitary district's adopting and carrying out other plans for disposing of sewage (pp. 417-418).

The Court held that the Secretary of War had no power to authorize the diversion for any purpose other than navigation. It said (pp. 417-418):

> "The normal power of the Secretary of War under Section 10 of the Act of March 3, 1899, is to maintain the navigable capacity of Lake Michigan and not to restrict it or destroy it by diversions. * * * Had an injunction then issued and been enforced, the Port of Chicago almost immediately would have become practically unusable because of the deposit of sewage without a sufficient flow of water through the Canal to dilute the sewage and carry it away. In the nature of things it was not practicable to stop the deposit without substituting some other means of disposal. This situation gave rise to an exigency which the Secretary, in the interest of navigation and its protection, met by issuing a temporary permit intended to sanction for the time being a sufficient diversion to avoid interference with navigation in the Port of Chicago. See *New York* v. *New Jersey*, 256 U. S. 296, 307, 308. The elimination and prevention of this interference was the sole justification for expanding the prior permit, the limitations of which had been disregarded by the Sanitary District. *Merely to aid the District in disposing of its sewage was not a justification, considering the limited scope of the Secretary's authority. He could not make mere local sanitation a basis for a continuing diversion.* * * * [Italics supplied.]

It may be that some flow from the Lake is necessary to keep up navigation in the Chicago River, which really is part of the Port of Chicago, but that amount is negligible as compared with 8,500 second feet now being diverted. Hence, beyond that negligible quantity, the validity of the Secretary's permit derives its

support entirely from a situation produced by the Sanitary District in violation of the complainants' rights; and but for that support complainants might properly press for an immediate shutting down by injunction of the diversion, save any small part needed to maintain navigation in the river. In these circumstances we think they are entitled to a decree which will be effective in bringing that violation and the unwarranted part of the diversion to an end."

The Court stated further (p. 420):

"And in so far as the prior diversion was not for the purposes of maintaining navigation in the Chicago River it was without any legal basis, because made for an inadmissible purpose. It therefore is the duty of this Court by an appropriate decree to compel the reduction of the diversion to a point where it rests on a legal basis and thus to restore the navigable capacity of Lake Michigan to its proper level."

It is, of course, not disputed that the primary and dominant purpose of constructing in the harbor a 70-acre fill and large filtration plant thereon is to provide the City of Chicago with a supply of filtered water. As in *Wisconsin* v. *Illinois* there was "no doubt that the diversion [was] primarily for the purposes of sanitation" (p. 415, quoted and adopted by the Court from the report of Special Master Charles Evans Hughes), there is no doubt here that the 70-acre fill and the structures to be erected thereon are intended primarily as an adjunct to the city's water system, any other and different use being only incidental. See 278 U. S. at 415, 419. And as in *Wisconsin* v. *Illinois*, "merely to aid the District in disposing of its sewage was not a justification, considering the limited scope of the Secretary's authority" (p. 418), for the issuance of a permit, so merely to aid the city in purifying or filtering its water supply is not justification for the permit issued in the case at bar. The proposed filtration plant will not "maintain the navigable

capacity of Lake Michigan" in the Outer Basin north of Navy Pier but will "restrict it or destroy it" (278 U. S. at 417).

In *Wisconsin* v. *Illinois* the right of Wisconsin and the other complainant states to enjoin the continuation of the diversion depended upon whether the permit issued by the Secretary under Section 10 was valid (278 U. S. at 417). In this case the right of petitioners, plaintiffs below, to enjoin the construction of the water filtration plant necessarily depends upon whether the permit issued by the Secretary under Section 10 is valid (Opinion of the Illinois Supreme Court, Appendix A, pp. xxvi-xxvii). In both cases, the ultimate question was whether the Secretary could make a local municipal purpose having no relation to navigation the basis for the issuance of a permit under Section 10. *Wisconsin* v. *Illinois* held that he could not. The Supreme Court of Illinois in the case at bar held that he could.

2. The Supreme Court of Illinois ignored the holding of this Court in *Wisconsin* v. *Illinois*, contenting itself with a quotation of the general dictum early in that opinion (278 U. S. at 413) that "The true intent of the Act of Congress was that unreasonable obstructions to navigation and navigable capacity were to be prohibited, and in the cases described in the second and third clauses of Section 10, the Secretary of War, acting on the recommendation of the Chief of Engineers, was authorized to determine what in the particular cases constituted an unreasonable obstruction." This statement by this Court, coming as it does early in the opinion, before the Court reached the controlling issue of whether the sanitary needs of the city were an admissible purpose for the permit (278 U. S. at 417, 420), does not, of course, constitute a repudiation by this Court of the later holding of the case. On the contrary, that statement merely recognizes that a diversion, and likewise a fill, having a primary purpose connected with navigation

may also have an adverse effect on other aspects of navigation (*e. g.*, a pier which invades an anchorage); and that there are certain other obstructions, such as bridges and power lines, functioning in furtherance of commerce, which have no substantial effect on navigation and which must cross navigable waters in order to perform their function.

Cases of the latter category present a surface anomaly which misled the Supreme Court of Illinois. The Secretary, said that Court, has issued permits for "many structures such as automobile and railroad bridges, oil and pipe-line crossings, and electric transmission lines, to name but a few [which] constitute no aid to navigation" (Appendix A, p. xxvii).

Implicit in the reasoning of the Illinois Supreme Court is the proposition that in issuing permits for such structures and obstructions the Secretary had declined to follow the holding of *Wisconsin* v. *Illinois* that the power of the Secretary under Section 10 "is to maintain the navigable capacity of Lake Michigan and not to restrict it or destroy it by diversions" (278 U. S. at 417) and that "Merely to aid the District in disposing of its sewage was not a justification, considering the limited scope of the Secretary's authority" (278 U. S. at 418).

A closer reading of *Wisconsin* v. *Illinois* by the Illinois court would have disclosed the error into which that court has fallen. It is apparent from this Court's opinion in that case that the statement that Section 10 prohibited "unreasonable obstructions to navigation and navigable capacity," was intended to refer to obstructions which not only constituted minor or negligible interferences with navigation, but which had to invade or cross over, through or under navigable waters in order to perform their necessary function. This is clear, both from this Court's approval (278 U. S. at 413) of *Maine Water Co.* v. *Knickerbocker Steam Towage Co.*, 99 Me. 473, 59 Atl. 953 (1905) (in which a water

pipe crossed the Kennebec River on a structure in the bed of the river), as holding that only "unreasonable obstructions" were prohibited, and also from the Court's statement (p. 418) that: "It will be perceived that the interference which was the basis of the Secretary's permit, and which the latter was intended to eliminate, resulted directly from the failure of the Sanitary District to take care of its sewage in some way other than by promoting or continuing the existing diversion." And again (p. 420): "The situation requires the District to devise proper methods for providing sufficient money and to construct and put in operation with all reasonable expedition adequate plants for the disposition of the sewage through other means than the Lake diversion."

Neither a sewage disposal system nor a water filtration plant must, in order to perform its function, be constructed in such a manner or such a place as to interfere with the navigability of waters of the United States. Either can be constructed so as to be completely removed from navigable waters. The record in this case shows that eight additional sites were studied for a water filtration plant (R. 516), three inland and far removed from the waters of the harbor (R. 398, 399). It can be unqualifiedly asserted that there was no inherent, compelling or inescapable necessity that the site chosen by the City of Chicago for the proposed plant be selected. There is as much reason to locate a jail, for reasons of security, in the navigable waters of the harbor as to locate a filtration plant there.

3. Whether or not the location of the proposed 70-acre plant in the waters of the harbor will materially interfere with navigation, as the trial court, who heard extensive expert testimony on this subject, found it would (R. 123, *Decree*, pp. 20-22), the Secretary of the Army was without power to authorize this gigantic obstruction in the harbor for the purpose of "mere local sanitation" (278

U. S. at 418). This Court did not say in *Wisconsin* v. *Illinois* that a reasonably small amount of water could be diverted so long as such diversion did not materially interfere with navigation. Rather the Court held, in the language quoted above, at pp. 9-10, that no amount of water could be diverted for the purpose of sewage disposal (278 U. S. at 418, 420). The decision of the Supreme Court of Illinois in the case at bar is flatly contrary to that holding of this Court.

CONCLUSION.

The Supreme Court of Illinois has construed an important Federal statute in such a manner as to mutilate the true meaning of that statute. The result of that erroneous construction is not only to permit a gigantic obstruction in the waters of the Federal harbor at Chicago, but to provide a precedent which, for all practical purposes, removes all checks on the power of the Secretary of the Army to authorize obstructions in and diversions of navigable waters. If allowed to stand, the decision of the Illinois Supreme Court will open the door to the impressment on land submerged by navigable waters of the United States in an established Federal harbor of whatever local municipal purpose and use the municipal authorities may conjure up, although essentially unrelated to the protection, improvement or maintenance of navigation or the control of navigation. Now that the St. Lawrence Seaway has become a certainty and is taking shape the potential and reserve of harbors on the Great Lakes, and particularly of the Outer Basin of Chicago harbor, should be protected by the Court against this manner of encroachment.

Because of the error of the Illinois Supreme Court in ignoring this Court's construction of the statute in *Wiscon-*

sin v. *Illinois* (278 U. S. 367) and the importance of the question presented, a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

OPINION OF SUPREME COURT OF ILLINOIS.

Docket No. 33122—Agenda 35—March, 1954.

Franklin B. Bowes *et al.*, Appellees, v. The City of Chicago *et al.*, Appellants.

MR. JUSTICE HERSHEY delivered the opinion of the court:

This is an appeal from an order of the circuit court of Cook County granting the plaintiffs-appellees a permanent injunction enjoining and restraining the defendants-appellants from constructing a water filtration plant in Chicago harbor. Hereafter in this opinion the parties will be referred to as they were designated in the circuit court of Cook County. The case comes to this court on appeal on the grounds that the validity of a statute, the construction of the constitution and the validity of a municipal ordinance are involved.

In the action below the plaintiffs sought to enjoin the city of Chicago from constructing a water filtration plant in Chicago harbor. The plaintiffs also sought to enjoin the Chicago Park District from consenting to such construction and to enjoin the defendant Great Lakes Dredge & Dock Co., a corporation, which had a contract with the city for some preliminary construction, from performing under said contract with the city. The water filtration plant under the proposed plans for construction was to be located in an area lying north of Navy Pier in the northerly half of the outer basin of Chicago harbor and of Harbor District No. 1 of the city of Chicago, the south

line of this site being a line parallel with and 400 feet north of the north line of Navy Pier. The proposed plant has an area, at the surface of Lake Michigan, of approximately 61 acres. The highest structure of the plant is to be 62 feet above the water level of the lake. The southwest corner of the proposed site is 500 feet from Lake Shore Drive and the northwest corner is 1550 feet from the drive. The indicated cost of construction is $85,000,000.

The many plaintiffs in this proceeding are grouped into four different categories: (1) a group of persons suing as citizens of the State of Illinois; (2) a group of persons suing as the owners of real estate and as taxpayers thereon, and also some fourteen of said group suing as water rate payers; (3) a group of persons, four in number, claiming to have contract and property rights that would be damaged by the construction of the filtration plant; and (4) two associations suing in furtherance of the interests of their members.

The trial court dismissed for want of equity the complaint with respect to groups (1) and (4). No appeal has been taken to this court from such dismissal. As a result of such ruling the only plaintiffs appearing in this court are those denominated as groups (2) and (3).

The group of plaintiffs suing as taxpayers are 43 separate owners of real estate in the city of Chicago, each of whom joins in this action by reason of ownership of and payment of general taxes extended against real estate located in the city of Chicago. It is contended by this group of plaintiffs that while the city proposed to build the filtration plant solely from water funds and the proceeds of waterworks certificates of indebtedness and not from general funds, the city did, however, obligate the general funds to a certain degree. The permit issued by the Secretary of the Army to the city of Chicago provided

in paragraph 6 thereof, "that if future operations by the United States require an alteration in the position of the structure or work herein authorized, or if, in the opinion of the Secretary of the Army, it shall cause unreasonable obstruction to the free navigation of said water, the owner will be required, upon due notice from the Secretary of the Army, to remove or alter the structural work or obstructions caused thereby without expense to the United States, so as to render navigation reasonably free, easy, and unobstructed; and if, upon the expiration or revocation of this permit, the structure, fill, excavation, or other modification of the watercourse hereby authorized shall not be completed, the owner shall, without expense to the United States, and to such extent and in such time and manner as the Secretary of the Army may require, remove all or any portion of the uncompleted structure or fill and restore to its former condition the navigable capacity of the watercourse." It is thus contended by this group of plaintiffs that at some future date the city may be required at its own expense to remove the entire filtration plant and restore the harbor to its original state. Moreover, the permit is to expire on December 21, 1955, and if at that time the city has not completed the filtration plant it will be required to remove all or any portion of the uncompleted structure and restore the harbor to its former condition. It is further required in the permit, by paragraph 12 thereof, that whenever commercial navigation requires and at the request of the district engineer the city of Chicago must dredge the approach channel and slip indicated on the permit. Furthermore, paragraph 13 of the permit requires the city of Chicago, when requested by the district engineer, to reimburse the corps of engineers in the amount of 25 percent of any expense involved in dredging shoals caused by accretion to the entrance channel between the gap in the outer breakwater and the lock in

the mouth of the Chicago River. These plaintiffs further point out that if the water fund were large enough to cover these expenditures, the city would be powerless to use the fund for that purpose. The Revised Cities and Villages Act expressly limits expenditures from the water fund to paying (1) the cost of maintenance and operation of the waterworks system, (2) obligations of the municipality theretofore issued that are payable by their terms from this revenue, and (3) certificates issued under certain other sections of the Revised Cities and Villages Act. (Ill. Rev. Stat. 1953, chap. 24, par. 22-28.) Clearly, therefore, expenditures made by the city, in pursuance of the above mentioned paragraph of the Federal permit, would necessarily have to be made from the general fund of the city of Chicago. This court stated in the case of *Price* v. *City of Mattoon,* 364 Ill. 512, that taxpayers were not proper parties to question the legality of a bond issue of the city of Mattoon, issued for the purpose of buying the water system of the local utility company and to start construction of a softening and filtration plant, for the reason that the bonds* issue was to be financed solely out of revenue derived from the sale of water to consumers and not out of any tax or taxes levied. The court stated that the purchase under such circumstances created no liability against the general funds of the city and no special liability on the city. Therefore, inasmuch as the purchase of the supply plant in the above matter would not result in the use of the taxpayers' money, the complainants had no right to enjoin the carrying out of the ordinances as taxpayers nor did they have such right as citizens to intervene to prevent an injury to purely public rights or property when none of them suffered a special or irreparable injury different in degree and kind from that suffered by

* Italics here and subsequently indicate apparent error in the opinion as certified.

the public at large. The court further stated that even though by some unforeseen contingency arising in the future the city might be required to make up a deficiency in public founds such speculative possibility could give no comfort to those plaintiffs, for in the matter at issue neither a debt nor a public fund of the city was directly or contingently involved.

In the situation at hand it is the general fund of the city of Chicago that is involved. Moreover, this is not a case of an unforeseen contingency arising in the future. Upon entering into the construction of any part of this filtration plant the city became liable upon all of its obligations under the Federal permit issued previous thereto, and there is a distinct foreseeable possibility that the city may be required to expend general funds in compliance with those provisions. The city has assumed an immediate and irrevocable liability by its action under the Federal permit. It is no less immediate and irrevocable because the city may conceivably never be compelled to make payments in fulfillment of some of these obligations. It is the right of a taxpayer to prevent misappropriation of public funds and the right is based upon the ground that taxpayers are considered owners of the property of the municipality, and whenever public officials threaten to pay out public funds for an unlawful purpose or to misappropriate public funds and thereby cause taxes to be levied to make good the misappropriation equity will prevent such unauthorized act. (*Dudick* v. *Baumann*, 349 Ill. 46.) These taxpayers therefore have a perfect right to seek a determination of whether the construction would be illegal and would entail a possible misapplication of general tax funds.

Fourteen of the plaintiffs embraced here in group (2) are water rate payers. They claim that as users of water for which they pay they, too, have a right to maintain the action here. The basis of their claim is that they have a

special interest in the water fund of the city of Chicago because they contributed by their payment for water to that fund and have a special interest therein. They claim that if the filtration plant is constructed it will result in a substantial increase in water rates. In *Price* v. *City of Mattoon* the plaintiffs sued not only as taxpayers but also as water rate payers seeking to enjoin the purchase of the water supply system. This court there held that as water rate payers the plaintiffs had no right to maintain the action. In that proceeding this court said, should plaintiffs as water users, aside from their status as taxpayers, fail, in the future, to pay the established water rates fixed by the city from time to time and be deprived of water, no special injury or interest was established at the time due to any apprehension or anticipation that such event will occur. An examination of the record does not disclose any allegation of water rates determined by the city. There is no failure on the part of the plaintiff[s]* to pay any existing rate nor any threat by the city to shut off the water from their property. When and if that time comes these plaintiffs will then have their remedy at law and an injunction will not now be granted in favor of said plaintiffs which is not based upon facts showing a reasonable probable cause for apprehension. (*Joseph* v. *Wieland Dairy Co.*, 297 Ill. 574.) The record here shows that the building of the filtration plant designated will not in fact cause a substantial increase in water rates more than it would were the same constructed at some other lawful place which is not disputed by the plaintiffs. In fact we are of the opinion that by the use of the funds now in the water fund and with future financing it is highly probable that the plant in question can be built without any increase in water rates. Therefore the fourteen water rate

* Brackets here and subsequently indicate matter apparently intended in opinion as certified.

payers cannot maintain the present action as water rate payers.

Also seeking to maintain this action is that group of plaintiffs embraced in group (3), four in number, who claim to have certain contracts and property rights that would be damaged by the construction of the filtration plant. In 1899 certain enabling acts were passed by the legislature relating to the extension of Lake Shore Drive. One act authorized the extension of the driveway over State waters and the reclamation and sale of submerged land between the driveway and the former shore. (Ill. Rev. Stat. 1953, chap. 105, pars. 125-129.) The other act granted title in the submerged land adjoining the driveway for a distance of 50 feet to the Commissioners of Lincoln Park, the predecessor of the defendant Chicago Park District.

Acting under this statutory authorization the Commissioners of Lincoln Park and the then owners of property along the shore line entered into a contract whereby the owners agreed to construct a driveway, to fill in the submerged land between the then shore line and the west line of the driveway, and to make certain payments to the park commissioners. The commissioners agreed to convey to the owners the submerged land between the driveway and the former shore line. Among other provisions the commissioners covenanted and agreed that: "no mooring of vessels to the sea wall for business purposes shall ever be allowed or shall any docks or piers be built east of said boulevard or driveway, and that if any lands are formed by accretions or otherwise east of said boulevard or driveway they shall never be used for the erection of buildings thereon, or for any purposes but those of a public park."

The nature of the legislative action, and of the agreement between the Commissioners of Lincoln Park and the

property owners has been the subject of litigation previously before this court and is fully discussed in the case of *People ex rel. Moloney* v. *Kirk,* 162 Ill. 138.

Plaintiff-owners contend that since in their views section 49-11 of the Revised Cities and Villages Act (Ill. Rev. Stat. 1953, chap. 24, par. 49-11) requires the approval by the Chicago Park District of the plan for the filtration plant, as a condition precedent to its construction, such approval cannot be given by the defendant Chicago Park District without violation of the terms of the aforementioned agreement or covenant. The covenant, its effect and operation, is discussed elsewhere in this opinion. It is sufficient at this time to say that the existence of the covenant and the allegation of its violation is sufficient to give the plaintiffs embraced in group (3) standing to sue. *City of Chicago* v. *Ward,* 169 Ill. 392.

Thus the only proper parties before this court and properly before the circuit court of Cook County were the group of plaintiffs designated as taxpayers and that group of plaintiffs designated as property owners. The group of plaintiffs designated as taxpayers sought to have a determination of the many questions concerning the legality of the construction of the proposed filtration plan[t]. For instance they sought to determine the validity of a certain Federal permit, the question of the necessity of obtaining a State permit, the question of the validity of an ordinance and a provision in the Revised Cities and Villages Act which is authority for reclamation of submerged lands under the waters of this State and the use of such reclaimed land for a water filtration plant. It is the contention of these plaintiffs that such use would constitute a violation of the trust under which the State of Illinois holds title to said lands.

It is first contended by the plaintiff-taxpayers in this action that the decisions of the courts establish that the

State of Illinois holds the lands under navigable waters within the State boundaries in trust for the purposes of navigation, commerce and fishing, and that the State may not grant these lands for a use which will materially interfere with these purposes. They further contend that in consideration of the public trust the legislature was without power to grant authority to the city of Chicago, or any municipality by virtue of the statute, to construct a filtration plant upon submerged land in navigable waters. Defendants counter this contention by asserting that the trust under which the State of Illinois holds submerged lands is not limited to the purposes of navigation, commerce and fishing, but extends to the promotion of the interest of the public and to protect the public purpose and public benefit. Upon an examination of the common law and cases in this and other jurisdictions, we are inclined to the belief that the State holds title to submerged lands subject to a trust the purpose of which is to protect all of the interests and benefits of the public in the navigable waters within the State of Illinois. It is unnecessary, however, for us to fully discuss the limits and extent of the public trust imposed upon the State of Illinois with respect to submerged lands, for the reason that whether the trust is limited as contended by plaintiffs or as broad and extensive as claimed by defendants, it is nevertheless conceded by plaintiffs in their brief filed in this court that the only question which they raise and which must be decided is whether the granting of land under navigable waters for this purpose, at this site, will materially interfere with the use of the waters for navigation. It is conceded by the plaintiffs in this court that the trust imposed upon the State of Illinois is not violated if the reclamation of these submerged lands and the construction of a filtration plant upon them will not materially interfere with the use of the waters for navigation.

The State of Illinois does own the land under the waters of large lakes within its boundaries as do other States of the union. The recent so-called "Tidelands Act" (Submerged Lands Act, Title II, sec. 3, approved May 23, 1953) recognized and reaffirmed such title in the States. Thus large portions of Lake Michigan east of the city of Chicago are within the boundaries of Illinois and are owned by the State. Constitution of 1870, art. I.

A disposition of these submerged lands, by the State, is a question of the power of the State, acting as a governmental body. Any disposition of submerged lands within its boundaries by any State is subject always to the paramount right of Congress to control navigation upon the waters so far as may be necessary for the regulation of commerce with foreign states and among the States of the Union. (*Illinois Central Railroad* v. *Illinois,* 146 U. S. 387.) The existence of this paramount right of Congress is not a limitation on the power of disposition by the State. So long as any disposition does not interfere with the right of navigation upon these waters no Federal question is involved. The city has obtained a permit from the Federal government granting it permission to construct a filtration plant upon these submerged lands. The validity of this permit and the extent of its application will be discussed elsewhere in this opinion.

The plaintiffs also concede that a filtration plant is for a public purpose, in the sense that the city has power to spend eligible public funds to build it in a proper place. These plaintiffs only question the location of the plant, contending that it constitutes a material interference with the navigation at this site.

For the same reason these plaintiffs assail section 49-11 of the Revised Cities and Villages Act (Ill. Rev. Stat. 1953, chap. 24, par. 49-11) as invalid. That statute states: "For

the purpose of constructing water purification plants and acquiring or constructing wharves, piers, docks, levees, or in connection with wharves, piers, docks, levees, elevators, warehouses, vaults, or necessary and appropriate tracks or terminal facilities, any municipality may reclaim the submerged land under any public waters within the jurisdiction of or bordering upon the municipality, and thereupon shall be vested with the absolute title, in fee simple, to the land so reclaimed. For any of these purposes the municipality may acquire, by purchase, condemnation or otherwise, the title of private or public owners to land lying beneath those public waters, and also the riparian or other rights of the owners of the shore land abutting on those public waters, or in or over those public waters, or the submerged land under those waters; * * *." Plaintiffs assert that if this section is construed to apply to land under navigable waters and to authorize the construction on such land of a plant which would materially interfere with navigation and commerce, then it is clearly beyond the power of the legislature, as this court has repeatedly defined that power. However, plaintiffs again concede that if this statute is construed to authorize only such reclamation and construction as will not materially interfere with navigation and commerce, then section 49-11 is not invalid.

We are thus brought to a consideration of the second contention raised by these plaintiff-taxpayers, the determination of which will be decisive of the questions above presented.

It is asserted by the plaintiff-taxpayers that the construction of the proposed filtration plant at the approved site in the Chicago harbor would materially interfere with navigation in the waters of Lake Michigan and within the harbor area. It is not every possible interference with navigation upon the waters of Lake Michigan and the harbor area that is condemned, but it is only substantial

material interference or obstruction with practical navigation upon the lake which is to be protected against. *Illinois* v. *Illinois Central Railroad,* 146 U. S. 387; *People* v. *Kirk,* 162 Ill. 138.

While we have found above that the public trust residing in the State government of Illinois is to protect all those rights and benefits of the people of the State of Illinois in the navigable waters within the boundaries of the State, including the right of navigation, it is nevertheless the paramount right of the Federal government to protect the navigability of these waters. Here the Secretary of the Army has issued a permit to the city of Chicago granting the city the right to construct a filtration plant upon submerged land in Lake Michigan within the harbor area. This permit was issued only after the chief of engineers had fully inspected the plans for the project and its relation to commerce and navigation in the vicinity. Complete plans for the proposed construction as well as maps and diagrams of the immediate harbor area and the entire lake shore of the city of Chicago were submitted to the chief of engineers and studied by him. Extensive hearings were held by the Army engineers, and as a result of those hearings it was recommended that the Secretary of the Army issue a permit after finding that the construction of the filtration plant as proposed and approved by the Federal department would not materially obstruct navigation within the harbor area.

We have reviewed the evidence presented in the record and find that it fails to show the construction of the proposed filtration plant will amount to a substantial interference with navigation in this immediate area. It is indicated that in the past the area of the harbor north of Navy Pier, where the plant is to be located, has been little used by vessels traversing Lake Michigan and this harbor. In fact there has been little navigation at all within this area

of the harbor. It is further shown that after the construction of the proposed plant there will remain just as many facilities for mooring vessels as was previously afforded. Adequate freeway will remain to permit vessels entering the north entrance of the harbor to proceed into any part of the harbor area. The construction of the filtration plant, as indicated, will provide even more facilities for vessels than existed prior thereto in the harbor area. It is provided by the Federal permit that the city authorities in constructing the filtration plant must provide a slip and wharfing facilities along the south boundary of the reclaimed property. This slip will provide all-weather mooring facilities permitting substantially greater protection from the elements than previously existed in the north area of the Chicago harbor. Plaintiffs offered extensive expert testimony that the construction of this filtration plant will materially interfere with future navigation in the Chicago harbor for the reason that it will occupy an area where piers might be built to handle a purported increase in lake traffic. It is at least questionable whether the area would be accessible to the required means of transportation necessary to commercial piers and wharfs, and whether this immediate area is the best place for pier and wharf facilities in the Chicago area. Almost all of the evidence presented by the plaintiffs is speculative in nature and based on little fact, if any. The Chicago harbor is admittedly an artificial harbor. The Chicago shore line on Lake Michigan is quite extensive and nothing in the record indicates that harbors constructed in the same manner as the existing Chicago harbor could not be constructed along any part of the Chicago lake front.

It is urged that the city council has abused its discretion in selecting the site of the filtration plant for the reason that it would interfere with navigation. The city has been entrusted, as a branch of the State government,

with the power to construct filtration plants upon submerged lands within the State's boundaries and in close proximity to the city, and as a corollary thereto exercises the State's discretion in protection of the public trust. The site selected is within the boundaries of the State of Illinois upon submerged lands, and within the area granted to the city of Chicago. However, before the selection of this site by the city of Chicago the consulting engineers had made their report to the city council, the council's finance committee had considered the matter fully and held a public hearing thereon, the commissioner of public works had filed his report as approved by the engineers, and the finance committee had recommended the site. After the Secretary of the Army had issued the Federal permit for the site pursuant to the Army's corps of engineers' hearing on the matter, the city council reaffirmed its earlier actions by accepting the conditions of the Federal permit. Having found that the actual site selected does not amount to a substantial interference with navigation and, in consideration of the extensive investigation conducted by various officers, employees, and committees of the city government, we cannot say that the city of Chicago abused its discretion in selecting this site. The city has selected the least costly of all of the proposed sites, one which [is] centrally located and very near the largest water intake tunnel. Its construction in this location will not require expensive condemnations and associated dislocations and inconveniences to the public inherent in other proposed sites. The city has exercised its discretion in a manner devoid of the taint of arbitrary and capricious action and in consideration of the general public welfare. The legislative judgment is conclusive unless the ordinance is shown to be arbitrary, capricious and unrelated to the public good. (*Jacobson* v. *Village of Wilmette*, 403 Ill. 250; *Father Basils Lodge, Inc.* v. *City of Chicago*, 393 Ill. 246.) The ordinance

selecting this site is thus presumptively valid. It is the considered opinion of this court that the construction of the municipal water filtration plant upon the submerged land at the site selected will constitute no material substantial interference with navigation whatsoever.

Plaintiff property owners who appear here as group (3) claim a violation of certain covenants by the Chicago Park District board in its failing to disapprove of and prevent the reclamation of these submerged lands at the site proposed and the erection of a filtration plant thereon. We have above discussed the act of the legislature which authorized the extension of a driveway over the submerged lands underlying the waters of Lake Michigan and the reclamation and sale of those submerged lands lying between the driveway as constructed and the former shore. Another act granted title in the submerged lands adjoining this driveway for a distance of 50 feet east of the driveway to the Commissioners of Lincoln Park. This act also provided that the Commissioners of Lincoln Park and their successors in office might have and exercise police power over the waters of Lake Michigan along the east side of this driveway and an extension thereof, for a distance of 250 feet, in the same manner as police power is exercised over the grounds of the park. In authorizing the construction of this driveway it is provided by the legislature that when a park board shall determine to extend a boulevard or driveway connected with any public park, it should prepare a plan and estimate "and shall obtain the consent in writing of the owners of at least two-thirds of the frontage of all of the lands not appropriated to or held for public use abutting on such public waters, in front of which it is proposed to extend such boulevard or driveway * * * the riparian or other rights of the owners of land on the shore adjoining the waters in which it is proposed to construct such extension, the said board of park commissioners may

acquire by contract with or deeds from any such owner; and in case of inability to agree with any such owner, proceedings may be had to condemn such rights according to the provision" of Article IX of the Cities and Village Act then in force.

Acting under this statutory authorization the Commissioners of Lincoln Park and the then owners of property along the shore line entered into a contract wherein the property owners agreed to build a breakwater and fill for the boulevard driveway and to fill in the submerged land between the then shore and the boulevard, and to make certain payments per front foot to the Commissioners of Lincoln Park. In consideration of the above the commissioners agreed to convey to the owners the submerged land between the driveway and the former shore line, to maintain the boulevard, and covenanted: "That no mooring of vessels to the sea wall for business purposes shall ever be allowed, nor shall any docks or piers be built east of said Boulevard or Driveway, and that if any lands are formed by accretions or otherwise, east of said Boulevard or Driveway, they shall never be used for the erection of buildings thereon, nor for any purposes but those of a public park."

Shortly thereafter the property owners conveyed their riparian rights and their title to the land occupied as a boulevard or driveway to the Commissioners of Lincoln Park by a deed which recited that the conveyance was "upon the further condition that the riparian rights herein granted and conveyed to the second party [Commissioners of Lincoln Park] shall never be used otherwise than for park purposes, and that the lands which may be formed by accretion or otherwise contiguous and belonging to the shore of said lake, thus formed, and made by said boulevard or driveway, shall never be used for the erection of

buildings thereon, or for any purposes but those of a public park, * * *."

Thereafter in 1896 the Commissioners of Lincoln Park deeded to the owners of property along the former shoreline the reclaimed submerged land between the driveway and the former shore. The consideration recited in this quitclaim deed was "the performance of the work so contracted for." (In reference to the construction of a driveway by the 1891 shore owners, in exchange for which they obtained this conveyance of the intervening submerged land.)

The nature of the legislative action, the agreement between the Commissioners of Lincoln Park and the property owners, and other aspects relating to the extension of Lake Shore Drive, constituted the subject of litigation previously before this court, which was fully discussed in the case of *People* v. *Kirk*, 162 Ill. 138, wherein the driveway project was sought to be enjoined by the Attorney General, and relief was denied.

It is contended by the property owners, that since in their view, section 49-11 of the Revised Cities and Villages Act (Ill. Rev. Stat. 1953, chap. 24, par. 49-11,) requires the approval by the Chicago Park District of the plans for the filtration plant as a condition precedent to its construction, such approval cannot be given by the defendant Chicago Park District without a violation of the terms of the aforementioned agreements or covenants. This section of the statute requires that "where any park district holds land abutting upon the shores of Lake Michigan adjacent to the submerged land intended to be reclaimed for the purpose of constructing water filtration plants, the approval of a plan by such park district showing the boundaries of the submerged land to be reclaimed and the character of buildings and structures to be erected thereon

shall first be obtained prior to the reclamation of such submerged land by any municipality."

The act authorizing the construction of this boulevard driveway gave the commission authority to contract and to reach an agreement with the property owners abutting the lake shore. The act thus contemplated the giving of some consideration and a meeting of minds on related points necessary to the execution of a contract or agreement. Certainly, the commission had a right to make any covenant in the interest of obtaining these riparian rights which did not violate the public interest or the purpose to be accomplished under the act. Having the right to contract for the construction of the boulevard and the right to convey the submerged land between the lake shore and the boulevard to defray the construction costs, without doubt the commissioners had full authority to contract and hence to enter into any reasonable covenant in regard to the conveyance of these lands and the securing of these riparian rights.

While covenants are generally created by deed, they may be created by a contract not involving the transfer of title to land, if consideration and other essentials of a contract are present. (14 Amer. Jur. 610, Covenants, Conditions, and Restrictions.) The Commissioners of Lincoln Park constituted a municipal corporation organized for the purpose of creating, improving, and maintaining a system of parks, boulevards, and driveways, and their powers and authority in these respects were plenary. *People ex rel. Hoyne* v. *Chicago Motor Bus Co.*, 295 Ill. 486.

At the time the contract containing the original covenant was executed the Commissioners of Lincoln Park had the right to acquire title to only the driveway area as extended, the title to submerged land for 50 feet east of the driveway, and were given police power over an additional 250 feet of

the waters of Lake Michigan contiguous to the new shoreline. The commissioners had no title to submerged land beyond a point 50 feet east of the driveway nor did the commissioners have any power over any of the submerged lands or the waters east of a point 250 feet east of the driveway as extended. Therefore the commissioners could only covenant with respect to that property over which they exercised control or to which they could claim title. If a liberal construction is granted the covenant contained in the contract as contended by plaintiff, then the contract was intended to and did create a right to have no buildings erected far out in the lake, the word "east" asserting a right in the commissioners to prevent the erection of buildings eastward from the driveway to an undescribed limit. Certainly there was no intention and without doubt no power in the Commissioners of Lincoln Park to covenant to prevent the erection of buildings beyond the limits of the area under their control.

This court in considering the effect to be given restrictive language found on plats of the area in Chicago immediately east of Michigan Avenue, and now known as Grant Park, reading: "Public ground—forever to remain vacant of buildings" and "open ground—no buildings," determined that it was the intention and purpose of the dedicators and the legal effect of the dedication to restrict the surface of the tract so as to prohibit the erection of buildings thereon for whatever purpose. (*City of Chicago* v. *Ward*, 169 Ill. 392; *Bliss* v. *Ward*, 198 Ill. 104; *Ward* v. *Field Museum*, 241 Ill. 496; *South Park Comrs.* v. *Ward & Co.* 248 Ill. 299; *Michigan Boulevard Building Co.* v. *Chicago Park Dist.* 412 Ill. 350.) We there held that these restrictions were applicable to the specific property dedicated and the submerged land later reclaimed and abutting directly upon the original dedication, but to no other.

It was determined in the *Chicago Yacht Club* cases

(*McCormick* v. *Chicago Yacht Club,* 331 Ill. 514; *Stevens Hotel Co.* v. *Chicago Yacht Club,* 339 Ill. 463,) that the privilege granted by the dedication of the park to the abutting lot owners was only that the public grounds should remain forever vacant of buildings, and that buildings constructed outside of the park area upon submerged land not immediately abutting the park shore would not be violative of the provisions contained in the dedication. Hence it was held that the erection of a Yacht Club building on submerged land in the harbor and not abutting the park did not violate the provisions. In the instant situation, the broad language of the covenant contained in the contract, if followed literally, would apparently have application to lands east of the park driveway without limit and over which the commissioners of the park have no control. The submerged lands at the chosen site of the proposed filtration plant lie entirely outside of the area over which the park district may claim control. For the covenant to have effect it must be construed to be applicable only to the lands over which the Commissioners of Lincoln Park have control, either by reason of ownership or by reason of the delegated police power.

We do not believe, however, that the broad covenant contained within the contract between the Commissioners of Lincoln Park and the property owners can be construed in its application without reference to the covenant contained in the quitclaim deed executed by the property owners in conveying their riparian rights to the Commissioners of Lincoln Park.

This court is inclined to agree with the statement concerning the contract and the deed of riparian rights made by the trial court as a finding in its decree. That finding states "a contract between the Commissioners of Lincoln Park and the shore owner and the conveyance referred to in finding (XIV) and other previous findings together

constitute one transaction and must be read and interpreted together." The conveyance referred to in finding (XIV) is the instrument wherein the shore owners quitclaimed their riparian rights to the Chicago Park District. As noted above the covenant contained within that deed specifically limited the park district's obligation to prevent the erection of buildings to the park property and "lands which may be formed by accretion or otherwise contiguous and belonging to the shore of said lake, thus formed, and made by said boulevard or driveway." The contract and the subsequent quitclaim deed of riparian rights constituting, under the authorizing acts, one transaction, and reading and interpreting those instruments as one transaction, we arrive at the conclusion that the covenant contained in the deed necessarily restricts the broad applicability of the covenant contained in the contract. The covenant of the deed is itself broad enough to cover all that area to which the park district, at the time of the transaction, might claim title or control. The deed describes the land on which building restrictions were forbidden in greater detail and to a degree more consonant with the authority and title possessed by the park district. Being later in time, in effectuation of the contract, and in relation to and a part of the one transaction, the deed necessarily restricts or limits the covenant of the contract.

The riparian rights of a shore owner have been defined as the right of accretion and right of access to the water from the land. (*Miller* v. *Com'rs of Lincoln Park,* 278 Ill. 400.) By this quitclaim deed the park district acquired the right to accretions to the park district property and shoreline and the right of access to the water. It was, undoubtedly the purpose of the parties in the execution of the quitclaim deed of these riparian right to assure the property owners that the park district property would never be used for the construction of buildings which would

deny to these property owners their view of the lake, that the riparian rights granted to the park district and the accretions to the park district property would never be used for other than park purposes. The covenant contained therein, providing an interpretation of the covenant contained in the previous contract, gives to that covenant a certain and definite meaning and ascribes to it certain limits of applicability entirely consonant with the power and authority of the park district and effectuates the obvious intention of the parties. Certainly there could be no intent or design on the part of the commissioners of the park district to promise or assert an authority beyond their power to exercise.

The site of the proposed reclamation of submerged land is located, at its southern extremity, more than 300 feet east of the easternmost point of accretions to the park district property. That point is the shortest distance between the area to be reclaimed and any part of park district property. At the northern extreme of the area to be reclaimed the distance between park district property and the submerged area is 1550 feet. It is thus seen that the entire area proposed to be reclaimed is beyond the property to which the park district claims title, beyond the 250 feet of water east of the park district over which the district has police power, and does not abut nor is it closely adjacent to any park district property. Consequently, the reclamation of this submerged land and the construction of a filtration plant thereon can constitute no violation by the park district of its covenant with the property owners.

It is next contended by plaintiffs that section 49-11 provides that the city must first obtain the approval of the Chicago Park District before it may reclaim submerged land adjacent to the park district's shoreline property and construct a filtration plant thereon. It is provided in sec-

tion 49-11 of the revised Cities and Villages Act that "For any of these purposes [those purposes set forth in the section] the municipality may acquire, by purchase, condemnation or otherwise, the title of private or public owners to lands lying beneath those public waters, and also the riparian or other rights of the owners of the shore land abutting on those public waters, or in or over those public waters, or the submerged land under those waters; provided, however, that where any park district holds land abutting upon the shores of Lake Michigan adjacent to the submerged land intended to be reclaimed for the purpose of constructing water filtration plants, the approval of a plan by such park district showing the boundaries of the submerged land to be reclaimed and the character of buildings and structures to be erected thereon shall first be obtained prior to the reclamation of such submerged land by any municipality." The Chicago Park District does not have any title to the waters or the submerged land at the proposed site of the filtration plant. The only rights residing in the park district which might be interpreted as incorporated under the provisions of this act are the riparian rights of the park district property abutting the shoreline and the police power of the park district extending for 250 feet east of the park district property over and upon the waters of Lake Michigan. We have demonstrated above that no part of these submerged lands proposed to be reclaimed lies within the limits of park district police authority. The park district's riparian rights have been shown to be the right to accretions to the shoreline and the right of access to the waters of the lake. The submerged land to be reclaimed will not abut upon park district shoreline property nor will it be an accretion thereto. Thus the riparian rights of the park district will not be affected by the reclamation of these submerged lands.

It is asserted, however, by plaintiffs that wherever submerged lands to be reclaimed are adjacent to park district shoreline property it becomes necessary for the city or municipality reclaiming those lands to obtain the approval of the park district. It is thus necessary for us to construe the meaning to be attached to the word "adjacent" as used in the proviso of section 49-11. "Adjacent" is defined in Webster's New International Dictionary, Second Edition Unabridged, as meaning "lying near, close, or contiguous; neighboring; bordering on; as, a field adjacent to the highway." Synonyms for "adjacent" cited by the same works are "nigh, juxtaposed, meeting, and touching." It is stated in the case of *People ex rel. Sackmann* v. *Keechler*, 194 Ill. 235, that "The word 'adjacent' is defined by Webster and other lexicographers to mean, 'to lie near;' 'close, or contiguous.' It is sometimes said to be synonymous with 'adjoining,' 'near,' 'contiguous.' In some decisions courts have held it to mean 'in the neighborhood or vicinity of;' in other 'adjoining or contiguous to.' [Citations.] * * * It has no arbitrary meaning or definition. Its meaning must be determined by the object sought to be accomplished by the statute in which it is used. This consideration manifestly controlled each of the courts in the interpretation placed upon the word in the cases cited." In *Husser* v. *Fouth*, 386 Ill. 188, "adjacent" was held to be synonymous with "contiguous" in a school case wherein a statute required the territory to be "compact, contiguous, and adjacent." This same case further said that words in statutes should be given their commonly accepted meaning unless otherwise defined by the legislature.

In a case determining the validity of an ordinance for the construction of sidewalks, the ordinance was found to be fatally defective for failing to specify the location of the sidewalk. The ordinance merely required that the side-

walk be "adjacent" to the curb. "Adjacent" was found to mean either lying near, close or contiguous. Objects were found to be adjacent when they lie close to one another, but not necessarily in contact. *City of Dixen* [*Dixon*] v. *Sinow & Weinman,* 350 Ill. 634.

We are thus directed by case law in the State of Illinois to apply to words appearing in legislative enactments their common dictionary meaning or commonly accepted use unless otherwise defined by the legislature, the specific meaning being determined by the object sought to be accomplished by the statute in which they are used. It is clear that the object of the proviso contained in section 49-11 was for the purpose of protecting the riparian and other rights of the park district owning the shoreline property and the use of that property for park purposes. The commonly accepted dictionary definition of "adjacent" and the common use of that word may clearly be attributed to it as the meaning implied by proviso of this statute. The submerged property to be here reclaimed must therefore lie close or near, or even contiguous or bordering upon, property of the park district in order to require the park district's approval of the proposed reclamation. We have previously determined herein that the reclamation of the submerged land at the proposed site of the filtration plant will not materially interfere with the riparian rights of the park district. It would constitute a strained application of the common meaning and usage of the word "adjacent" to determine that the proposed reclamation is so closely adjacent to the park property as to deny or adversely affect the use of that park property for park purposes. We are of the opinion that in this situation it was not incumbent upon the city of Chicago to obtain the approval of the Chicago Park District in order that it might validly proceed with the reclamation of the submerged land and the construction of the filtration plant thereon.

The Chicago Park District by resolution of its board of commissioners has determined that "the proposed construction of said filtration plant in the above described area will not adversely affect the interests of the Chicago Park District." Thus, the Chicago Park District has, in its discretion, determined that its park property will not be adversely affected by the construction of the filtration plant. This resolution was passed, not at the request of the city of Chicago, but at the request of the United States Army and the Illinois Division of Waterways. However, were such approval by the Chicago Park District required by the provision of the statute, this resolution would meet the requirements of that act.

These plaintiffs also maintain that the city lacked valid authority to proceed from either the Federal or the State governments. In this connection it is urged that the permit issued by the Secretary of the Army is invalid, for the reason that the structure permitted is obviously an obstruction in an established public harbor and admittedly constructed for a purpose having no connection with navigation or commerce. The power to change, alter, or obstruct navigable waters over which Congress has assumed jurisdiction is not acquired until the consent of the Federal government has been obtained thereto, and whether or not such consent is obtained has been held to be not merely a question between the Federal government and the party erecting such structure or making a change, but is a ques-[tion] for one whose property is affected thereby. (*Department of Public Works and Buildings* v. *Engel,* 315 Ill. 577.) Here the city of Chicago proposes to build a filtration plant within the harbor area in Lake Michigan adjacent to the city of Chicago. A permit had been obtained from the Federal government. Pursuant to that permit, however, the city of Chicago has become liable upon possible future foreseen liabilities in connection with the construc-

tion and alteration of this filtration plant, and the maintenance of the surrounding harbor area. Since such contracted liability will be a drain upon the general fund of the city of Chicago, it is the property of the taxpayers which will be directly affected. The taxpayers consequently may question the validity of the Federal permit.

In the case of *Wisconsin* v. *Illinois,* 278 U. S. 367, the Chief Justice in explaining the function of the permit of the Secretary of War (Now Secretary of the Army) in the statutory scheme said: "The true intent of the Act of Congress was that unreasonable obstructions to navigation and navigable capacity were to be prohibited, and in the cases described in the second and third clauses of section 10, the Secretary of War, acting on the recommendation of the Chief of Engineers, was authorized to determine what in the particular cases constituted an unreasonable obstruction." The Secretary of the Army may therefore permit such structures to be erected upon submerged lands underlying navigable waters as do not unreasonably interfere with the navigable capacity thereof. We have already determined that the reclamation of these submerged lands and the erection thereon of this municipal filtration plant does not constitute a material, substantial, or unreasonable obstruction to navigation.

It is not necessary that structures erected upon submerged lands under navigable waters be necessarily in aid of navigation. Many structures such as automobile and railroad bridges, oil and pipe-line crossings, and electric transmission lines, to name but a few, constitute no aid to navigation. At the same time they do not constitute unreasonable obstructions to navigation and are within the power of the Secretary of the Army to permit. This permit, issued on the recommendation of the chief of engineers after thorough investigation and exhaustive hearings,

is not invalid as beyond the discretion of the Secretary of the Army.

These same taxpayers finally contend that the reclamation of these submerged lands and the erection of the filtration plant thereon is illegal for the reason that the city of Chicago failed to obtain a permit from the Department of Public Works and Buildings of the State of Illinois for the construction of this plant. It is provided by section 18 of the act of 1911 in relation to regulation of rivers, lakes and streams, (Ill. Rev. Stat. 1953, chap. 19, par. 65) that "It shall be unlawful to make any fill or deposit of rock, earth, sand, or other material, or any refuse matter of any kind or description, or build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structure, or to do any work of any kind whatsoever in any of the public bodies of water within the state of Illinois, without first submitting the plans, profiles, and specifications therefor, and such other data and information as may be required, to the Department of Public Works and Buildings of the State and receiving a permit therefor signed by the Director of said department and authenticated by the seal thereof; * * *." It is thus seen by this section that it is declared unlawful to do any work in the public waters of the State without first obtaining a permit from the Department of Public Works and Buildings. However, section 49-11 of the Revised Cities and Villages Act, the statutory authority for the construction of this municipal filtration plant, authorizes a municipality to construct water purification plants and reclaim submerged land under any public bodies of water within the jurisdiction of or bordering upon the municipality provided that the plan for the construction be approved by the park district if the district holds land abutting upon the shores of Lake Michigan adjacent to the submerged land intended to be reclaimed.

Section 18 of the act above referred to was enacted into law in 1911, whereas section 49-11 of the Revised Cities and Villages Act was amended in 1949 to specifically authorize a municipality to construct water filtration plants and reclaim submerged land as therein provided. Section 18 is an act of general application, whereas the amendment to section 49-11 is a specific provision. Where there are two statutory provisions, one of which is general and designed to apply to cases generally, and the other is particular and relates only to one subject, the particular provision must prevail and must be treated as an exception to the general provision, especially where the particular provision is later in time of enactment. (*People ex rel. Atwell Printing and Binding Co.* v. *Board of Comrs.*, 345 Ill. 172; *People ex rel. Fere* v. *Missouri Pacific Railroad Co.*, 342 Ill. 226.) The provision of section 49-11 is obviously an exception to section 18 of the prior act. The legislature having given specific permission to the city to construct the water filtration plant upon submerged lands within the jurisdiction of or adjacent to the boundaries of the city, it is not required that the city obtain a permit from the Department of Public Works and Buildings in order to proceed with the construction thereof pursuant to the provisions of section 18.

Several other issues are raised by the parties to this proceeding, but in view of our determination of the above questions it is unnecessary for this court to consider them. All the questions considered have been determined adversely to the plaintiffs. The construction of the filtration plant will not violate the public trust nor materially interfere with navigation, and section 49-11 of the Revised Cities and Villages Act and the ordinance of the city of Chicago authorizing the construction of the plant at this site are valid. The Chicago Park District has not violated its covenant with the plaintiff property owners, nor was

it necessary that it approve the plans for reclamation of these submerged lands and the construction of this filtration plant. A valid Federal permit has been acquired by the city and it was unnecessary for the city to procure a permit from the Illinois Department of Public Works and Buildings. For these reasons the decree of the circuit court of Cook County is necessarily reversed and the cause is remanded to that court, with directions to dissolve the injunctions restraining and enjoining the city of Chicago, the Chicago Park District and the Great Lakes Dredge & Dock Co., from proceeding with any actions in relation to the reclamation of these submerged lands and the construction of a filtration plant thereon.

Reversed and remanded, with directions.

APPENDIX B.

33 U. S. C. § 403.

"§ 403. *Obstruction of navigable waters generally; wharves; piers, etc.; excavations and filling in.*

The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War;* and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War* prior to beginning the same. (Mar. 3, 1899, ch. 425, § 10, 30 Stat. 1151.)"

* The title of the Secretary of War was changed to Secretary of the Army by Act of July 26, 1947, ch. 343, Title II, § 205(a), 61 Stat. 501.

Appendix "C"

United States of America

State of Illinois,
Supreme Court, ss.:

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the tenth day of May in the year of our Lord, one thousand nine hundred and fifty-four, within and for the State of Illinois.

Present: Walter V. Schaefer, Chief Justice, Justice William J. Fulton, Justice George W. Bristow, Justice Harry B. Hershey, Justice Joseph E. Daily, Justice Ralph L. Maxwell, Justice Ray I. Klingbiel, Latham Castle, Attorney General, Harry G. Newman, Marshal.

Attest: Earle Benjamin Searcy, Clerk.

Be it remembered, that, to-wit: on the 24th day of May, 1954 the same being one of the days of the term of Court aforesaid, the following proceedings were, by said court, had and entered of record, to-wit:

No. 33122

Franklin B. Bowes, et al., Appellees

vs.

City of Chicago, a municipal corporation, Chicago Park District, a municipal corporation, and Great Lakes & Dock Co., a corporation, Appellants

Appeal from Circuit Court, Cook County. 52 C 7425.

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises, are of the opinion that in the record and proceedings aforesaid, and in the rendition of the decree aforesaid, there is manifest error.

Therefore, it is considered by the Court that for that

error and others in the record and proceedings aforesaid the decree of the Circuit Court of Cook County in this behalf rendered, be reversed, annulled, set aside and wholly for nothing esteemed, and this cause be remanded to the Circuit Court of Cook County with directions to dissolve the injunctions restraining and enjoining the city of Chicago, the Chicago Park District and the Great Lakes Dredge & Dock Co., from proceeding with any actions in relation to the reclamation of these submerged lands and the construction of a filtration plant thereon.

And it is further considered by the Court that the said appellants recover of and from the said appellees costs by them in this behalf expended to be taxed, and that they have execution therefor.

I, Earle Benjamin Searcy, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In witness whereof, I have hereunto subscribed my name and affixed the Seal of said court this 9th day of June A.D. 1954. (S.) Earle Benjamin Searcy, Clerk, Supreme Court of the State of Illinois. (Seal.)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 295

FRANKLIN B. BOWES, et al.,

Petitioners,

vs.

CITY OF CHICAGO, a Municipal Corporation, CHICAGO PARK DISTRICT, a Municipal Corporation, and GREAT LAKES DREDGE & DOCK CO., a Corporation,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

Re-statement of Question Presented.

Does the Secretary of the Army under the applicable statute (33 U. S. C. 403) have power to authorize, in the navigable water of Lake Michigan, a fill *which does not unreasonably interfere with navigation,* although its primary purpose is not to aid navigation but to serve as the foundation for a water filtration plant of the City of Chicago?

A controlling circumstance omitted from petitioners' phrasing of the question (Pet., p. 2) is indicated by the

italicized language. Petitioner's statement, by including circumstances such as the area of the filtration plant and its location in "an established and existing harbor", etc., seeks to create the impression that the plant will unreasonably interfere with navigation. Yet petitioners do not ask for review of the Illinois Supreme Court's express affirmance of the Secretary of the Army's finding of fact to the contrary (App. to Pet., pp. xii, xxvii).

Restatement of the Case.

The outstanding fact in this case is that the City of Chicago's water filtration plant in Lake Michigan, as found by the Illinois Supreme Court, will not constitute a "material, substantial or unreasonable" interference with navigation (p. xxvii). This finding and other facts, not mentioned in the Petition for Certiorari, show how greatly this case differs from *Wisconsin* v. *Illinois,* 278 U. S. 367 (1929), which is claimed by petitioners to conflict with the present decision. We therefore call attention to the following:

The site of the plant is scarcely used at all for navigation. The site is in the north part of Chicago Harbor,* 400 feet north of Navy Pier, which extends 3000 feet from its approach into the harbor and 1000 feet beyond the site of the filtration plant, and which divides the harbor into two parts. See Appendix B to this brief (a reproduction of sheet 2, p. 4, Ex. D to Compl., R. 2). Ships entering

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* Chicago Harbor is one of two harbors in the Port of Chicago. In the last 60 years traffic in Chicago Harbor and River has declined from seven to four million tons, while in the other harbor—Calumet Harbor and River approximately 12 miles to the south—traffic has increased from two to 23 million tons (Def. Exs. 31 and 32; R. 377, 378, 546; Appendix A to this brief).

and leaving the harbor use the area south of the pier (R. 192, 194), which contains the entrance to Chicago River and its extensive shipping facilities (R. 202-204; Pltf's. Ex. 23, Chart, R. 159, 484). Navy Pier, though built in 1916 by the city to serve navigation, has exclusively served other purposes for many years (currently the University of Illinois, a city traffic court, and an exposition hall, R. 188, 192, 197). Its only present service to navigation is to protect the south part of the harbor from the heavy prevailing winds that make the area north of the pier of little value as an anchorage (R. 358, 414). In fact in the north area Anchorage A, which is for commercial vessels (R. 411), has been used only twice as a harbor of refuge in 18 years (R. 378). The only vessel operating in the north area is a sightseeing vessel (R. 192-193).

The Illinois Supreme Court found:

> ". . . in the past the area of the harbor north of Navy Pier, where the plant is to be located, has been little used by vessels traversing Lake Michigan and this harbor. In fact there has been little navigation at all within this area of the harbor". (App. to Pet., p. xii.)

Construction of the filtration plant will preserve and improve facilities of the area for navigation, even though almost no navigation has existed in the area. The permit of the Secretary of the Army requires the city to provide slip and wharfing facilities on the south side of the plant. The Illinois Supreme Court found:

> "The construction of the filtration plant, as indicated, will provide even more facilities for vessels than existed prior thereto in the harbor area. . . . This slip will provide all-weather mooring facilities permitting substantially greater protection from the elements than previously existed in the north area of the Chicago Harbor." (App. to Pet., p. xiii.)

The site of the plant is not needed for future development of navigation. Petitioners sought to prove by extensive evidence that the 70-acre site of the plant will occupy an area where piers could be built to handle a claimed increase in lake traffic.* The waterfront in the Port of Chicago includes 20 miles of the shore of Lake Michigan, the shores of Lake Calumet, and many miles of the branches of the Chicago and Calumet Rivers (R. 192; App. A to this brief; Def. Dredge Co. Ex. 2, Map of Calumet Harbor, R. 452, 571). If required by future navigation needs, breakwaters could be constructed to make harbors and protect piers at many other places, just as the breakwaters have formed Chicago Harbor. In ruling against petitioners' evidence, the Illinois Supreme Court found:

> "It is at least questionable . . . whether this immediate area is the best place for pier and wharf facilities in the Chicago area. *Almost all of the evidence presented by the plaintiffs is speculative in nature and based on little fact, if any.* The Chicago Harbor is admittedly an artificial harbor. The Chicago shore line on Lake Michigan is quite extensive and nothing in the record indicates that harbors constructed in the same manner as the existing Chicago Harbor could not be constructed along any part of the Chicago lake front." (App. to Pet., p. xiii, italics added.)

In addition to these crucial facts, other omissions by petitioners require the following restatement:

The city, fortunate in having in Lake Michigan a convenient and abundant supply of fresh water, has for many decades drawn the city's water from the lake at cribs

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* Several official proposals for improvement of Chicago Harbor in the last half century have recommended new navigation facilities south of Navy Pier but none has recommended improvement in the area north of the pier except the filtration plant itself (R. 207-209, 296-297, 309, def ex. 3, 418, 508).

several miles from shore. Tunnels transport the water from the cribs to the public distribution system inland (App. A and B to this brief). A filtration plant serving the south third of the city was completed in 1947 at the lake shore (R. 172, 388, 393, 434). After studying sites for a filtration plant to serve 3,000,000 people in the remainder of the city, the city council in November 1949 chose the site in the area north of Navy Pier (R. 398, 511, 517). An Illinois statute authorizes a municipality such as Chicago to construct a water filtration plant on submerged land under public waters bordering the municipality (Ch. 24, par. 49-11, Ill. Rev. Stat. 1953).

The site chosen is next to the city's largest intake tunnel, which brings water from one of the cribs to a central pumping station (R. 503). An inland site also considered would have required the additional transportation of 4,000,000 tons of water daily for a mile under city streets (R. 404) and would have cost $8,000,000 more to construct on the basis of 1949 prices (R. 516). The location selected, as held by the Illinois Supreme Court, "will not require expensive condemnations and associated dislocations and inconveniences to the public inherent in other proposed sites". (App. to Pet., p. xiv.)

The riparian owner along the shore opposite the site of the plant is the respondent Chicago Park District, which owns and maintains Lake Shore Drive (App. B to this brief). By resolution of January 10, 1950 the park district stated that its interests would not be adversely affected by construction of the plant (R. 98, 99).

The petitioners for certiorari have no interest in shipping (R. 508) and sue in this Court as taxpayers of the respondent city. Four of the petitioners own property abutting the west side of Lake Shore Drive (American

Furniture Mart Building Co., Inc., Beck Oil Company, Beatrice Joyce Kean, and Lakefront Realty Corporation, Def. Ex. 18; R. 441, 526). The building company's property is improved with the 34-story Furniture Mart (R. 140), the Beck Oil Company's with a gasoline filling station (R. 166), and petitioner Kean's with two advertising signs (R. 135, 467). The president of the building company stated publicly before a committee of the city council of Chicago in February, 1949 that he "would fight the selection of a lake front site through the courts if it took 30 years" (R. 145).

The city filed an application on December 13, 1949 with the District Engineer of Chicago, Corps of Engineers, United States Army, for a permit to make a fill for the construction of a filtration plant at the site selected. After notice to interested persons, a public hearing in February 1950 attended by petitioner's attorneys (R. 70-71, 96, 103), and a study of the area (R. 371), the permit was issued on January 19, 1951 (Ex. D to compl., R. 2). It granted authority to the city "to construct a fill in Chicago Harbor north of Navy Pier" according to plans attached to the permit. The plans and the work, it was said, "are recommended by the Chief of Engineers and are authorized by the Secretary of the Army" under section 10 of the Rivers and Harbors Appropriation Act of 1899, approved March 3, 1899 (33 U. S. C. 403). The many conditions in the permit include requirements that the city must provide free docking facilities for two large commercial vessels in the slip between the filtration plant and Navy Pier and must dredge the approach channel and the slip to a depth of 21 feet.

After accepting the conditions of the permit in March, 1951 (R. 517) and advertising for bids, the city council in May, 1952 entered into a contract with respondent

Great Lakes Dredge & Dock Co., for the building of a cofferdam for the plant at a price of $6,597,510 (R. 106, 518). The dredge company began work on June 16, 1952 (R. 448).

On June 23, 1952 the petitioners with many other persons (a total of 53) filed this suit to enjoin construction of the plant. Their complaint (R. 2) attacked the filtration plant project on many grounds of state and federal law, including claims that the state statute authorizing the construction of the plant on submerged land was invalid, that the city had failed to obtain a permit under a state statute, that four of the plaintiffs had riparian and contract rights allegedly violated by the construction of the plant, that the plant at its site would violate federal constitutional provisions, and that the permit issued by the Secretary of the Army was invalid.

At the trial many witnesses were heard and much documentary evidence was introduced (R. 129-593, which is an abstract). The trial court sustained many of the plaintiffs' claims when it entered a decree in October, 1953 enjoining the construction of the plant (R. 123).

The Illinois Supreme Court by unanimous decision on May 24, 1954 reversed the trial court's decree on every ground of federal and state law on which the injunction had been granted, including the trial court's finding (R. 123, pp. 21, 33) that the filtration plant would obstruct the navigation facilities of the plant site and that the federal authorities had abused their power in issuing the permit. It was held, however, that the petitioners who are taxpayers could question the validity of the federal permit since it imposed possible future liabilities on the city (App. to Pet., xxvi-xxvii).

In rejecting the petitioners' claim that the plant site was invalid under *state law* because of the claimed interference

with navigation, the Illinois Supreme Court said (App. to Pet., pp. xi-xii) that the applicable principle did not condemn

> "... every possible interference with navigation upon the waters of Lake Michigan and the harbor area ... but ... only substantial material interference or obstruction with practical navigation upon the lake ..."

After finding the facts (pp. xii-xiii) as indicated above, the opinion concluded on the state law question that the plant "will constitute no material substantial interference with navigation whatsoever" (p. xv).

Later in the opinion, the court answered petitioners' contention that the permit of the Secretary of the Army was invalid because it authorizes an obstruction "in an established public harbor . . . for a purpose having no connection with navigation or commerce". After quoting *Wisconsin* v. *Illinois*, 278 U. S. 367, 413 (1929), to the effect that section 10 of the 1899 statute prohibits "unreasonable obstructions to navigation and navigable capacity" and authorizes the Secretary "to determine what in the particular cases constituted an unreasonable obstruction", the Illinois Supreme Court continued (pp. xxvii-xxviii):

> "The Secretary of the Army may therefore permit such structures to be erected upon submerged lands underlying navigable waters as do not unreasonably interfere with the navigable capacity thereof. We have already determined that the reclamation of these submerged lands and the erection thereon of this municipal filtration plant does not constitute a material, substantial, or unreasonable obstruction to navigation.
>
> "It is not necessary that structures erected upon submerged lands under navigable waters be necessarily in aid of navigation. Many structures such as automobile and railroad bridges, oil and pipe-line crossings, and electric transmission lines, to name but a

> few, constitute no aid to navigation. At the same time they do not constitute unreasonable obstructions to navigation and are within the power of the Secretary of the Army to permit. This permit, issued on the recommendation of the chief of engineers after thorough investigation and exhaustive hearings is not invalid as beyond the discretion of the Secretary of the Army."

The permit was thus held valid on the ground that the Secretary of the Army may authorize a structure which, though not in aid of navigation, does not unreasonably obstruct navigation and that, on the facts, the city's filtration plant will not be an unreasonable obstruction.

Under Rule 45 of the Illinois Supreme Court final process issues within 15 days after the court's ruling if a petition for rehearing is not filed as in this case. The city and the dredge company were thus enabled to resume construction work in June, 1954.

Position of Respondent Park District.

The park district is not a proper party to the petition for certiorari since the relief sought against it (complaint, R. 2 pp. 63-64) has no bearing on any question of federal law.

REASONS FOR DENYING CERTIORARI.

1. The Illinois Supreme Court's decision is not in conflict with Wisconsin v. Illinois, 278 U. S. 367 (1929).

Petitioners' claim of a conflict between the Illinois Supreme Court's decision and *Wisconsin* v. *Illinois* is based on a mistaken interpretation of the latter as holding that the Secretary of the Army, acting under section 10 of the Rivers and Harbors Appropriation Act of 1899, may au-

thorize a fill or other structure in navigable water only if the primary purpose of the structure is to aid navigation. Petitioners also overlook the controlling facts which differentiate that case from the case at bar.

In *Wisconsin* v. *Illinois* the part of Chief Justice Taft's opinion relevant here is his discussion of Section 10 of the 1899 statute and the authority granted by it to the Secretary of War (pp. 412-413):

> "Congress . . . intended to leave to the Secretary of War, acting on the recommendation of the Chief of Engineers, the determination of what should be approved and authorized in the classes of cases described in the second and third clauses of Section 10. If the section were construed to require a special authorization by Congress whenever in any aspect it might be considered that there was an obstruction to navigable capacity, none of the undertakings specifically provided for in the second and third clauses of Section 10 could safely be undertaken without a special authorization of Congress. We do not think this was intended . . .
>
> "The true intent of the Act of Congress was that unreasonable obstructions to navigation and navigable capacity were to be prohibited, and in the cases described in the second and third clauses of Section 10, the Secretary of War, acting on the recommendation of the Chief of Engineers, was authorized to determine what in the particular cases constituted an unreasonable obstruction.
>
> "This construction of Section 10 is sustained by the uniform practice of the War Department for nearly thirty years. Nothing is more convincing in interpretation of a doubtful or ambiguous statute."

The Chief Justice then explained that this construction of the Secretary's authority was the only one consistent with the Court's decision in *Sanitary District of Chicago* v. *United States*, 266 U. S. 405 (1925), wherein the Court held

the diversion of water from Lake Michigan unlawful.* Chief Justice Taft said of the earlier case (p. 414):

> "The decision there reached and the decree entered can not be sustained, except on the theory that the Court decided first that Congress had exercised the power to prevent injury to the navigability of Lake Michigan and the other lakes and rivers in the Great Lakes watershed, and second that it could properly and validly confer the administrative function of passing on the issue of unlawful injury or otherwise on the Secretary of War, and that it had done so. *To give any other interpretation would necessarily be at variance with our previous decision.*" (Italics added.)

In other words, the national interest in navigation under the interstate commerce clause is protected under the statute by forbidding unreasonable obstructions to navigation, but the Secretary is authorized to permit an obstruction found to be not unreasonable. The test of his authority is not whether the structure aids navigation, as contended by petitioners here, but whether it unreasonably obstructs navigation.

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*Petitioners (Pet., p. 8) quote a remark from Mr. Justice Holmes's opinion in the *Sanitary District* case expressing doubt as to whether the Secretary in deciding to grant or withhold a permit, "was authorized to consider . . . the sanitary needs of Chicago." The context shows that the Court was merely refuting a contention that the Secretary, in denying a permit for diversion of lake water, had wrongly disregarded the sanitary needs of the city. The Secretary had determined that the diversion was an unreasonable obstruction to navigation, and Mr. Justice Holmes doubted that the Secretary could, despite that finding, grant a permit in consideration of sanitary needs. The *Wisconsin* case has since decided that he cannot. From both cases it is clear that when the Secretary has determined that an obstruction will not be unreasonable, he may issue a valid permit whatever its purpose.

The clear statement of the law by Chief Justice Taft was expressly followed by the Illinois Supreme Court (p. xxvii). By this rule there can be no question of the validity of the Secretary's permit for the construction of the fill to serve as a foundation for the filtration plant.

Petitioners, however, seek to vary the clear meaning of this statement of the law by reference to later portions of Chief Justice Taft's opinion where the Court held that Chicago's sanitary needs did not provide a legal basis for the diversion of 8500 feet per second. But the facts then before the court were materially different from the facts here. It is only the earlier "general dictum" (as styled by petitioners, p. 11) that is applicable here.

In *Wisconsin* v. *Illinois* the complainant and other states bordering the Great Lakes sought an injunction to prevent injuries to their riparian rights and interests in navigation by the diversion of water from Lake Michigan through the Chicago River, thence through connecting waterways into the Illinois and Mississippi Rivers. It was of central importance that Wisconsin was asserting rights against Illinois founded upon constitutional law. This was the issue as the Court stated it (p. 409):

> "The exact issue is whether the State of Illinois and the Sanitary District of Chicago by diverting 8500 cubic feet from the waters of Lake Michigan have so injured the riparian and other rights of the complainant States bordering the Great Lakes and connecting streams by lowering their levels as to justify an injunction to stop this diversion and thus restore the normal levels."

On the question of fact the Court's Master found for the complainants:

> "The Master finds that the damage due to the diversion at Chicago relates to navigation and commercial interests, to structures, to the convenience of summer

resorts, to fishing and hunting grounds, to public parks and other enterprises; and to riparian property generally . . ." (p. 408).

His report contained specific data of which the Chief Justice remarked (p. 409):

> "The great losses to which the complainant States and their citizens and their property owners have been subjected by the reductions of levels in the various Lakes and Rivers except Lake Superior are made apparent by these figures."

Illinois sought to justify the diversion by claiming, among other things, that Congress had authorized it through a permit granted by the Secretary of War under the 1899 statute. Illinois thus argued that a permit from the Secretary of War justified "great losses" to riparian states and "injurious consequences to the Great Lakes navigation" (p. 419). This argument did not prevail.

The Court stated first (p. 415) that even Congress

> ". . . may not arbitrarily destroy or impair the rights of riparian owners by legislation which has no real or substantial relation to the control of navigation or appropriateness to that end."

After finding nothing in the Acts of Congress relating to the Illinois waterway which could justify so great a diversion, Chief Justice Taft continued (p. 417):

> "The normal power of the Secretary of War under Section 10 of the Act of March 3, 1899, is to maintain the navigable capacity of Lake Michigan and not to restrict it or destroy it by diversions."

Consequently, a permit from the Secretary could not justify continuance of the destructive diversion of 8500 cubic feet, although the temporary permit then in force could be supported as an emergency measure in the interests of

navigation to clear the Chicago River of sewage. The final holding did not in fact declare the permit invalid* but rather granted Wisconsin a decree requiring the Sanitary District to lower the diversion over a period of time calculated to enable it to develop means for treatment of its sewage.

With the facts of *Wisconsin* v. *Illinois* in mind, it is clear that the Chief Justice nowhere qualified or impugned his comprehensive statement of the rule governing the Secretary of the Army's authority. Statements such as those quoted by petitioners (pp. 9-10) must be read in the light of these facts. Nowhere in the petition is there any mention of the outstanding fact in the case of the serious injury to the riparian states. When the Chief Justice said (p. 418),

> "Merely to aid the district in disposing of its sewage was not a justification, considering the limited scope of the Secretary's authority. He could not make mere local sanitation the basis for a continuing diversion."

he meant that the disposition of sewage was not a justification for a permit that authorized a diversion damaging the navigation and property interests of the riparian states.

In this latter part of the opinion the Chief Justice has set down the obvious converse to the general rule. By section 10 the Secretary has been granted authority to determine what is an unreasonable obstruction to navigation. He has *not* been granted authority to permit an unreasonable obstruction to navigation for the sake of the sanitary needs of Chicago. Much less has he been authorized to determine whether the sanitary needs of Chicago should pre-

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* It is noteworthy that the complainants requested the court to do so (278 U. S. 411). Instead the Court construed "the effect and operation of the permit of 1925 as authority for the maintenance of the diversion." (278 U. S. 417.)

vail over the property rights and navigational interests of other riparian states on the Great Lakes.

The instant case, however, does not raise these limitations on the Secretary's authority. As found by the Illinois Supreme Court, the filtration plant will not "materially, substantially, or unreasonably" interfere with navigation. No property right or navigational interest of the petitioners is involved. No private or public person or organization with an interest in navigation is objecting or claiming an interference with navigation. The nearby riparian owner, the respondent park district, is not objecting. In striking contrast to *Wisconsin* v. *Illinois,* the petitioners have no right to an injunction based on injuries done to them which the city seeks to justify by a permit from the Secretary. The sole question is whether the city's filtration plant will unreasonably obstruct navigation, and this is the precise question which Congress has delegated to the Secretary of the Army.

Accordingly, the Illinois Supreme Court's decision is a correct application of the relevant holding in *Wisconsin* v. *Illinois.* It correctly stated the law in saying that a structure in navigable waters need not "be necessarily in aid of navigation" (p. xxvii). It follows what this Court in 1929 described as "the uniform practice of the War Department for nearly thirty years" (278 U. S. 413).

Petitioners are therefore in error when they say (p. 11) that in both *Wisconsin* v. *Illinois* and this case "the ultimate question was whether the Secretary could make a local municipal purpose having no relation to navigation the basis for the issuance of a permit under Section 10". In *Wisconsin* v. *Illinois* the ultimate question was whether the diversion was unlawful with respect to Wisconsin. The Court held that it was and that the Secretary of War could not

make it lawful; but the unlawfulness came from the injury to Wisconsin's rights and interests, not from the sanitary purpose of the diversion. In this case no one asserts any right or interest to be injured by the proposed fill. The ultimate question is whether the fill will unreasonably obstruct navigation. On this issue the Secretary of the Army has found that it will not, the Illinois Supreme Court has affirmed, and petitioners have not sought review.

2. Petitioners' misinterpretation of Wisconsin v. Illinois would invalidate many non-navigation uses of navigable water.

Petitioners' reading of *Wisconsin* v. *Illinois* would mean that the Secretary of the Army under section 10 may authorize a structure only if it aids navigation. Such a result would invalidate many great structures that cross navigable waters in this country, such as bridges for automobile traffic, railroad bridges, oil and gas pipe lines, piers for transmission lines, etc.* The Illinois Supreme Court

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* The record and decided cases illustrate permitted uses of navigable water that do not aid navigation as follows:

The cribs in Lake Michigan from which Chicago withdraws water for its public distribution system. (See *Erie & Western Transportation Co.* v. *Chicago,* 178 Fed. 42 [C. A. 7, 1910], indicating that the Secretary of War issued a permit for a crib situated several miles from shore.)

Water filtration plants of other municipalities located on reclaimed land on the shore of Lake Michigan (Hammond, Indiana; Racine, Wisconsin; and Evanston, Winnetka, Glencoe, Fort Sheridan, Highland Park and Lake Forest, Illinois, R. 439. The City of Milwaukee's filtration plant was built entirely on reclaimed land under the navigable water of Lake Michigan, and a permit was obtained from the Secretary of War for constructing it there [R. 295, 305-306, 310.] According to an offer of proof rejected by the trial court, the Secretary of War issued a permit for the City of Chicago's South District Filtration Plant [R. 369-370]).

(p. xxvii) said that such structures, while not aiding navigation, "do not constitute unreasonable obstructions to navigation and are within the power of the Secretary of the Army to permit".

To avoid this sensible result, petitioners are driven to argue (pp. 11-13) that such structures do not violate the

---

The *water pipe of a water company* in the bed of a navigable river. (In *Maine Water Co.* v. *Knickerbocker Steam Towage,* 99 Me. 473, 59 Atl. 953 [1905], the water pipe was held to have been validly authorized by a permit of the Secretary of War under section 10 of the 1899 act, and Chief Justice Taft in *Wisconsin* v. *Illinois,* 278 U. S. at 413, stated that the United States Supreme Court concurred in the holding of the Maine Supreme Court.)

A *vehicular tunnel* under the Hudson River for which the Secretary of War issued a permit. (See *Sullivan* v. *Booth and Flinn,* 206 N. Y. S. 360 [App. Div. 1924]).

A *power cable and water main* across a bay used in supplying water to the City of Superior, Wisconsin (see *Lakewood S. S. Co.* v. *Superior Water Light & Power Co.,* 88 F. 2d 895 [C. A. 7, 1937]).

A *sewer pipe* constructed across the channel of Mamaroneck Harbor on Long Island Sound by Westchester County. (*Sound Marine & Machine Corp.* v. *Westchester County,* 100 F. 2d 360, 363 [C. A. 2, 1938], held that the sewer pipe line laid as provided by the permit of the Secretary of War was not unlawful, the permit having been issued under Section 10 of the 1899 statute. See same case, 15 F. Supp. 812, D. C. S. D. N. Y.; *cert den.* 306 U. S. 642.)

A *high tension transmission line* over a navigable river. (*Thompson* v. *Consolidated Gas Electric Light and Power Co.,* 111 F. Supp. 719, 722 [D. C. Md. 1953], held that the line erected pursuant to the secretary's permit under section 10 of the 1899 statute was not an unlawful obstruction to navigation.)

The *property of some of the petitioners* in this case which is part of 93 acres of filled land within the federal breakwater at Chicago Harbor (R. 462-466, 482, 501, 503, 525) (The fill was held not to be a material interference with navigation in *People* v. *Kirk,* 162 Ill. 138 [1896]).

rule which they derive from *Wisconsin* v. *Illinois* because they are "[1] in furtherance of commerce, . . . [2] have no substantial effect on navigation and . . . [3] must cross navigable waters in order to perform their functions".

Petitioners cite nothing from any opinion of this court to support such an exception. But even if the exception did exist, the filtration plant comes as clearly within its supposed terms as do the admittedly valid instances. First, the filtration plant is in furtherance of commerce; it aids commerce in water just as much as piers and docks aid navigation; it is part of the process of procuring, purifying, and transporting water to industrial as well as domestic customers. Second, it has been conclusively determined that the plant will not substantially interfere with navigation. And, third, since the proposed site will avoid serious dislocations on land as well as save at least $8,000,000 (1949 prices) on initial cost, largely because of its nearness to existing intake pipes, the degree of necessity pertaining to this site for the filtration plant is at least as great as that pertaining to the structures in the cited cases.

Petitioners' great concern for the public interest in navigation is misplaced. Their theory would require rivers to be crossed by ferries, and oil and gas to be transported by rail or water. They overlook the great public interest served by non-navigation uses of navigable waters. The water filtration plant will serve "drinking and domestic purposes" which are "the highest uses of water", *Connecticut* v. *Massachusetts*, 282 U. S. 660, 673 (1930). A municipality has "no higher public duty" than that of "furnishing an ample supply of pure and wholesome water for public and domestic uses", *Brush* v. *Commissioner*, 300 U. S. 352, 369 (1936). Yet petitioners would require aid to navigation or "inescapable necessity" when a government agency locates a facility with such a high public purpose,

even though the interference with navigation is not substantial. The true test, as held in *Wisconsin* v. *Illinois,* is the reasonableness of the interference with navigation.

For this reason, there is a clear answer to petitioners' argument (p. 14) that the decision of the Illinois Supreme Court will "open the door" to undesirable uses of navigable waters for local municipal purposes not related to navigation. The requirement of a permit, grantable only if navigation is not unreasonably obstructed, fully protects the national interest in navigable waters.

3. Petitioners' exaggerated language about the filtration plant is contrary to findings which they do not seek to have reviewed.

The federal question presented is described in the petition in terms of the statutory power of the Secretary of the Army rather than the correctness of his exercise of the power. The petition does not expressly ask for review of the Secretary's finding of non-interference with navigation, affirmed by the Illinois Supreme Court.

Yet the petition makes statements of alleged fact that are relevant only to a contention that the filtration plant will unreasonably obstruct navigation. The petition repeatedly emphasizes the size of the plant as well as its location in the Outer Basin of Chicago harbor (see pp. 3-4, 5, 10-11, 14). The site is described as "not located within shoal and shallow waters unfit for navigation". The plant is referred to as "a gigantic obstruction in the waters of the Federal harbor at Chicago". It is argued that the "potential and reserve" of Great Lakes harbors "and particularly of the Outer Basin of Chicago harbor" should be "protected by the court" from the "encroachment" of the filtration plant, now that the St. Lawrence Seaway will be developed. The plant, it is said (pp. 10-11), will not

maintain navigation in the area north of Navy Pier but will "restrict it or destroy it". Petitioners are in effect asking this court to review findings of fact that the plant will not unreasonably obstruct navigation.

The Secretary of the Army's determination under section 10 of the 1899 statute that the plant will not unreasonably interfere with navigation will be disturbed by the courts only if it reaches that "bad degree" that can be said to be "arbitrary or wanton," *Greenleaf Lumber Co.* v. *Garrison*, 237 U. S. 251, 268 (1915); *United States* v. *Commodore Park, Inc.*, 324 U. S. 386, 392 (1944); *Miami Beach Jockey Club* v. *Dern*, 83 F. 2d 715, 719 (C. A. D. C. 1936).

The Illinois Supreme Court (see restatement of the case, *supra*) did not disturb but affirmed the Secretary's determination with its own findings that the filtration plant will not substantially or unreasonably interfere with the navigable capacity of Lake Michigan. The opinion (p. xii) explained that the permit was issued by the Secretary only after extensive hearings and full consideration of the relation of the project to commerce and navigation in the vicinity. In the past, it was noted, the area north of Navy Pier "has been little used by vessels", and "there has been little navigation at all within this area of the harbor". Not only will the plant preserve the navigation facilities in the area that existed before, but will provide "substantially greater protection from the elements than previously existed in the north area of the Chicago harbor" (p. xiii). The petitioners' evidence intended to prove that the plant would materially interfere with "future navigation" was characterized by the Illinois Supreme Court as "speculative in nature and based on little fact, if any" (p. xiii). Accordingly it was held that the permit "is not invalid as beyond the discretion of the Secretary of the Army" (p. xxvii-xxviii).

Petitioners' repeated reference to the location of the plant in a *harbor*, described as "federal", is also answered by the findings of fact. Petitioners argue as if a structure or fill in a harbor is somehow different in kind from obstructions in other places in navigable water. The third clause of section 10 of the 1899 statute, which is the provision applicable here, treats harbors as no different from other parts of navigable water (it forbids, without a permit, the filling of "any port, roadstead, haven, *harbor*, canal, *lake*, harbor of refuge"). The Secretary of the Army necessarily considered the location of the plant in Chicago Harbor, which is protected by federal breakwaters, as a factor in determining the reasonableness of the interference with navigation. This is apparent from the conditions imposed by the federal permit which mean that the filtration plant, as the Illinois Supreme Court found (p. xiii), "will provide even more facilities for vessels than existed prior thereto in the harbor area". The Illinois Supreme Court also explained that the Chicago harbor is "an artificial harbor" and that similar harbors could be constructed "along any part of the Chicago lake front" which is "quite extensive" (p. xiii).

The Secretary's finding that the interference with navigation is not unreasonable, sustained by the Illinois Supreme Court, makes it immaterial that the plant will cover a large area in a harbor. In fact the conditions imposed by the Secretary will cause the finished structure to be a substantial aid to navigation should any develop in this part of the harbor.

Conclusion.

The Illinois Supreme Court's decision concerning the authority of the Secretary of the Army under section 10 of the 1899 statute follows carefully the rule defined in *Wisconsin* v. *Illinois* and there described as the War Department's uniform practice for 30 years. The rule does not require any clarification that might be provided by review in this case. Accordingly the Illinois Supreme Court's decision does not present the "special and important reasons" for granting certiorari required by this Court's Rule 19.

Petitioners, who are suing as taxpayers and did not file suit to invalidate the Secretary's permit until more than a year after it was granted, have no "special and important" interest damaged by the filtration plant of the kind that equity traditionally protects or that justifies review by this court. The granting of certiorari would merely keep alive their efforts to find some fault or flaw in a worthy public project and create a temporary doubt of its legality.

Respondents urge that the writ of certiorari be denied.

Respectfully submitted,

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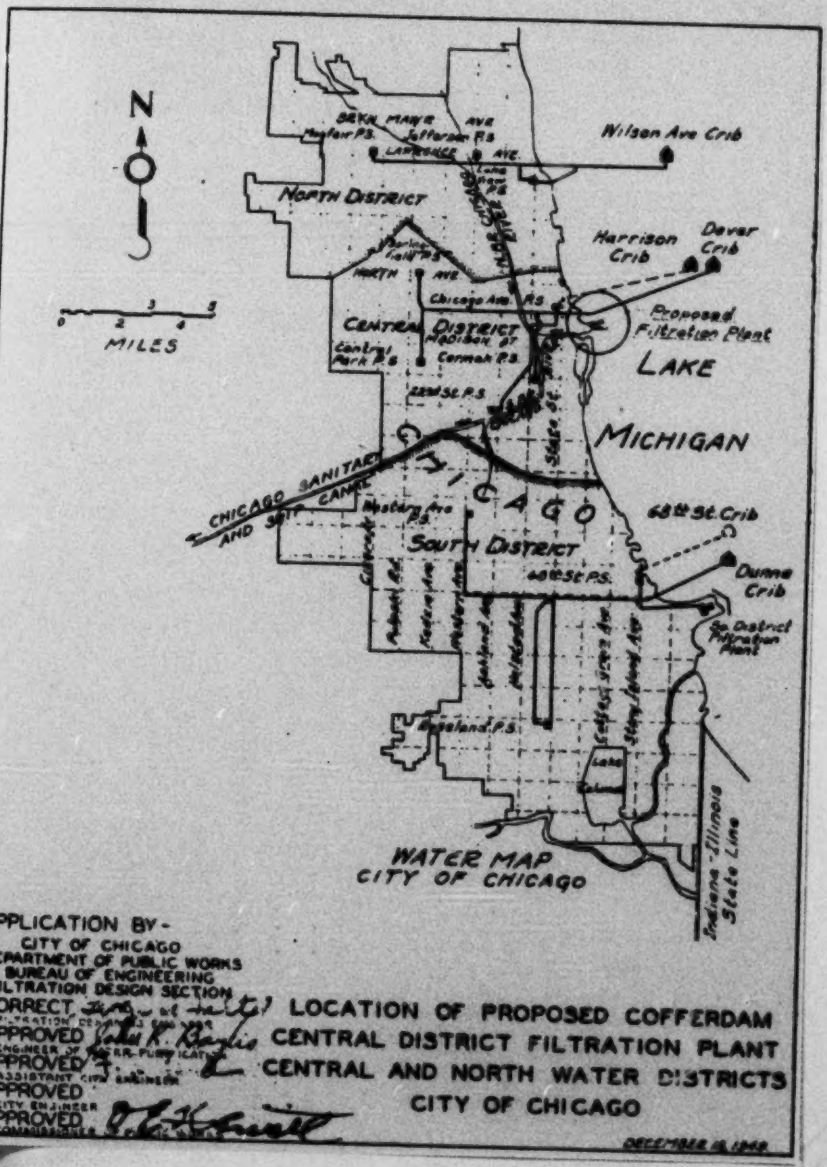
Appendix A.



APPLICATION BY -
CITY OF CHICAGO
DEPARTMENT OF PUBLIC WORKS
BUREAU OF ENGINEERING
FILTRATION DESIGN SECTION

CORRECT [illegible]

APPROVED [illegible]
ENGINEER OF WATER & SEWER PURIFICATION

APPROVED [illegible]
ASSISTANT CITY ENGINEER

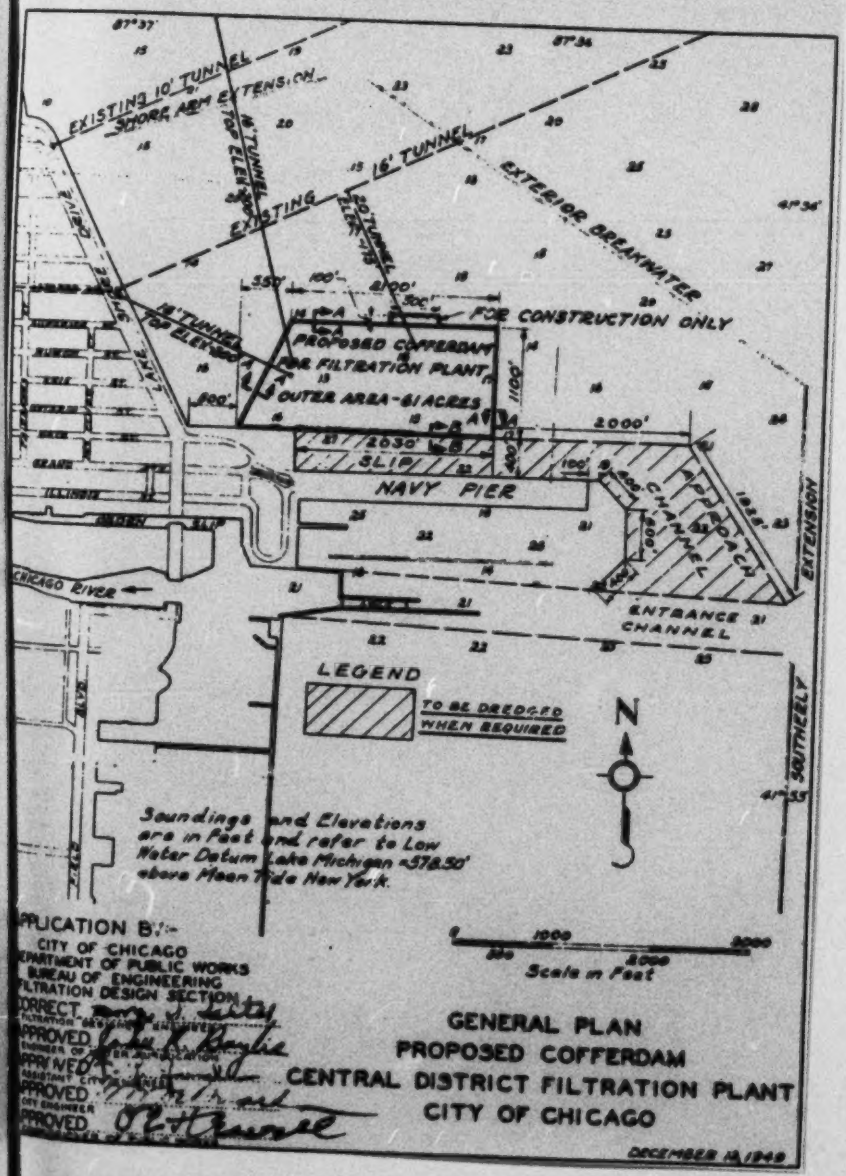
APPROVED [illegible]
CITY ENGINEER

APPROVED [illegible]
COMMISSIONER OF PUBLIC WORKS

LOCATION OF PROPOSED COFFERDAM
CENTRAL DISTRICT FILTRATION PLANT
CENTRAL AND NORTH WATER DISTRICTS
CITY OF CHICAGO

DECEMBER 18, 1940

Appendix B.



APPLICATION B.:-
CITY OF CHICAGO
DEPARTMENT OF PUBLIC WORKS
BUREAU OF ENGINEERING
FILTRATION DESIGN SECTION
CORRECT
APPROVED
APPROVED
APPROVED
APPROVED

GENERAL PLAN
PROPOSED COFFERDAM
CENTRAL DISTRICT FILTRATION PLANT
CITY OF CHICAGO

DECEMBER 15, 1949

FILED
SEP 24 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 295

FRANKLIN B. BOWES, ET AL.,

Petitioners,

vs.

CITY OF CHICAGO, A MUNICIPAL CORPORATION, CHICAGO PARK DISTRICT, A MUNICIPAL CORPORATION, AND GREAT LAKES DREDGE & DOCK CO., A CORPORATION,

Respondents.

PETITIONERS' REPLY BRIEF.

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THE RUSSELL-MORGAN PRINTING COMPANY, CHICAGO

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Respondents.

PETITIONERS' REPLY BRIEF.

Respondents recognize (Br., p. 12) that acceptance of their interpretation of the dictum appearing early in the opinion in *Wisconsin* v. *Illinois*, 278 U. S. 367, 413 (1929), requires that the holding of that case somehow be distinguished. The distinction they offer is that the complainants in that case were states asserting injury to riparian and other property rights. However, the issue in that case was whether the Secretary had power to issue a permit under Section 10 based on the domestic needs of the city. The complainants had standing to raise that issue because they

had riparian and other property rights. Petitioners here have standing, under the law of Illinois, to raise the same issue because they are taxpayers. Granted standing to raise the issue in both cases, the legal issue is the same: *viz.*, whether Section 10 gives the Secretary power to issue a permit for a local municipal purpose having no relation to navigation.

Congress did not contemplate, when it enacted Section 10, that the Secretary was to be given unlimited discretion to allow any sort of obstruction in or diversion of navigable waters. This is apparent from the statute itself, the first clause of which prohibits "any obstruction not affirmatively authorized by Congress," and the second and third clauses of which suggest various obstructions and other works having to do with navigation which the Secretary may authorize. *Wisconsin* v. *Illinois*, 278 U. S. 367 (1929) squarely held that Section 10 did not permit the Secretary to issue a permit under Section 10 for a local municipal purpose.

Respondents make repeated reference to the conclusion of the Illinois Supreme Court, which was contrary to that of the chancellor who heard the evidence, that the reclamation of the submerged lands and the construction of a filtration plant thereon will not constitute an unreasonable obstruction to navigation. We recognize that the question of effect on navigation is one of fact, which this Court would not be disposed to review. We therefore will not detail here the voluminous evidence (some of which is found at R. 183-184, 189, 190, 212, 219, 225-246, 250-251, 275-281, 288, 297-298, 318, 321, 324-332), much of it in the form of testimony by leading transportation authorities and most of it uncontradicted, to the effect that the fill and construction of the plant would very materially interfere with and impair navigation. For the same reason we do not take the space

to refute various distortions and half truths concerning the facts which appear on pp. 2-5 of respondents' brief.[1]

We do submit, however, that a glance at the map is enough to show the significance of the size and location of the plant (concerning which respondents are understandably sensitive, Br., p. 19). We further submit that to say, as did the Illinois Supreme Court (Appendix to Petition, pp. xii, xiii, xxvii), that the plant does not interfere with navigation because the harbor isn't used and anyway if a harbor is needed another one can be built,[2] is not to meet the test laid down by *Wisconsin* v. *Illinois*. That decision did not say that a "reasonable" amount of water could be diverted but rather, as demonstrated in the petition, that no amount of water could be diverted for the purpose of sewage disposal. (278 U. S. at 418, 420.)

As the petition demonstrates, pp. 11-13, the dictum in *Wisconsin* v. *Illinois* concerning unreasonable obstructions (278 U. S. at 413) merely recognizes that an obstruction or diversion in aid of navigation may also adversely affect navigation in some respects, and that there are other obstructions functioning in furtherance of commerce which must cross navigable waters in order to perform their

1. For example, respondents state, in the footnote on p. 2, that traffic at Chicago Harbor and River has declined from seven to four million tons, while traffic at the other harbor, Calumet Harbor and River, has increased from two to 23 million tons, although the evidence is undisputed that the great majority of facilities in Calumet Harbor and River are designed and used exclusively for bulk cargo (e. g., iron ore, coal) (R. 190), and that harbor area is adapted to the handling of bulk rather than general cargo while Chicago Harbor is adapted to the handling of general rather than bulk cargo (R. 183, 184, 219, 324-327).

2. In this connection it should be noted that the fatuous assertion that a new harbor for the handling of general cargo could be constructed along any part of the Chicago Lake Front (Br., p. 21) completely ignores the physical facts apparent to any one who knows Chicago's lake front.

function. Respondents seek to bring the filtration plant within the latter "exception,"[3] as they term it. They assert, but do not intimate how that assertion can be maintained, that the filtration plant is in furtherance of commerce which of course means interstate commerce in this context. They seek (Br., p. 18) to meet the inescapable necessity test by stating that location of the plant at the site proposed "will avoid serious dislocations on land as well as save at least $8,000,000 (1949 prices) on initial cost." This statement takes only inland sites as a basis of comparison and ignores alternative sites elsewhere on Chicago's "quite extensive" (Br., p. 21) lake front and outside of any public harbor. Moreover, the $8,000,000 figure is erroneous even as it relates to an inland site, for, in asserting that a saving in that amount would result, respondents ignore the cost of constructing a 16-foot tunnel upwards of five miles through solid rock which would be necessitated by construction of the plant at the site selected. (R. 1, *Complaint*, p. 15, par. III, (c), (x), not denied by City's *Amended Answer*, R. 80, par. 3 (c) (X); see R. 123, *Decree*, p. 6, Finding of Facts [vii].)

3. Most of the cases referred to in the footnote on pp. 16-17 of respondents' brief involved structures which had to be placed in, under or over the waters in question in order to perform their function, and thus fall within the class of cases discussed at pp. 11-13 of the petition. The others are inapposite for different reasons: None of the filtration plants of other municipalities appear to have been placed in navigable waters except Milwaukee's, which is far removed from the harbor "and from waters that are navigable as a common practice." (R. 305-306.) (If a Federal permit was issued for the Milwaukee plant, and the record (R. 306) does not definitely show one was, it does not appear that there was any challenge to the validity of that permit.) In *People* v. *Kirk*, 162 Ill. 138 (1896) (decided before the enactment of section 10) the land reclaimed was expressly found (162 Ill. at 151, 155) to be under shoal waters and, of course, no Federal permit was involved. The legality of the Secretary's permit for the laying of a sewer pipe in a trench beneath the bottom surface of the harbor was not challenged in *Sound Marine & Machine Corp.* v. *Westchester County*, 100 F. 2d 360 (2d Cir. 1938).

The filtration plant will constitute an obstruction in the harbor, as respondents necessarily admit. That the obstruction would be reasonable (*i.e.*, not unreasonable) would be material if the facility in question were, for example, a bridge, which in order to perform its function would of necessity be built over water. In such a case the degree of obstruction should be weighed against the need for land transportation, with the consequence that if navigation were only reasonably affected, the Secretary of the Army could grant a permit to build the bridge. In the case at bar, however, there is no countervailing necessity against which to weigh the obstruction to navigation, for the local need for filtered water can be as well satisfied by a filtration plant located elsewhere than in the harbor.

There is no compelling and inescapable necessity that a 70-acre filtration plant be erected, of all places, in the midst of the Federal harbor. Location of the plant at that site cannot be "reasonable" within the meaning of *Wisconsin* v. *Illinois*, and is beyond the power of the Secretary to authorize.

Respectfully submitted,

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